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In the

Supreme Court of the United States

OCTOBER TERM, 1967

No. [redacted] 9

BERNARD SHAPIRO, Welfare Commissioner of Connecticut

Appellant

v.

VIVIAN THOMPSON

Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

APPENDIX TO APPELLANT'S BRIEF

ROBERT K. KILLIAN
Attorney General
30 Trinity Street
Hartford, Connecticut

FRANCIS J. MACGREGOR
Assistant Attorney General
99 Meadow Street
East Hartford, Connecticut

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RELEVANT DOCKET ENTRIES

Proceedings

DATE	
1967	
2/15	Complaint filed.
2/15	Application for Leave to Proceed in Forma Pauperis, filed, together with Affidavit of Indigency. Order granting permission to proceed in forma pauperis, entered. Blumenfeld, J. M-2/6/67
2/15	Appearance of Brian L. Hollander, (Neighborhood Legal Services, Inc.), entered for Plaintiff.
2/15	Application for Convening of Three-Judge District Court, (28 USC, Sec. 2281), filed.
2/16	Summons issued and together with copies of same and of Complaint, Applications and Order, handed to the Marshal for service.
2/23	Marshal's return showing service, filed. — Summons, applications and Order, Complaint.
2/24	Designation of Judges entered. The following judges are designated to sit in this case: Honorable J. Joseph Smith, USCJ; Honorable M. Joseph Blumenfeld, USDJ; and Honorable T. Emmett Clarie, USDJ. J. Edward Lumbard, Chief Judge, U.S. Court of Appeals, 2nd Circuit. M-2/27/67 Copies mailed 3 judges; Atty. Hollander and Commissioner Shapiro.

3/2

Appearance of Francis J. MacGregor, Assistant Attorney General, entered for defendant, Bernard Shapiro. Copies to 3 judges.

3/2

Motion to Dismiss Complaint for Lack of Jurisdiction and Notice of Motion, filed by Defendant. Copies to 3 judges.

3/2

Copies of Complaint sent to Governor of the State of Conn. and to the Attorney General for the State of Conn., pursuant to 28 U.S.C. Sec. 2284 (2).

3/2

Notification sent by the Clerk to the United States of the pendency of this action, pursuant to 28 U.S.C., Sec. 2403 (1965). 3 copies served upon the United States Attorney and 2 copies sent Registered Mail by the U.S. Marshal to the Attorney General of U.S., return receipt requested. Copies sent to counsel for the plaintiff and defendant and to the Governor and Attorney General for the State of Conn.

3/6

Marshal's return showing service, filed. — Notification.

3/6

Notice of Motion (re Motion to Dismiss), filed by Defendant. Copies to 3 Judges.

3/20

Brief on Motion to Dismiss, filed by Defendant. Copies mailed to 3 Judges.

3/23

Memorandum of Law in Opposition to Defendant's Motion to Dismiss, filed by Plaintiff. Copies handed to Judges Smith, Blumenfeld & Clarie.

3/27

Hearing on Defendant's Motion to Dismiss Complaint for Lack of Jurisdiction. Motion denied. Smith, U.S.C.J.; Blumenfeld, U.S.D.J.; Clarie, U.S.D.J. M-3/28/67

3/31

Notification received from the Solicitor General of the United States to the effect that the United States of America will not intervene in this case, pursuant to 28 U.S.C. Sec. 2403 (1965). Copies of said notification sent to the 3-Judge District Court panel.

4/3

Answer, filed. Copies mailed to three Judges.

4/25

Order entered that this case will be assigned for trial on Friday, May 5, 1967, at 10:00 a.m., at Hartford, Conn. Steps to be taken in preparation for hearing included in Order. Smith, USCJ; Blumenfeld, USDJ; Clarie, U.S.D.J. M-4/27/67. Copies mailed to counsel; copies distributed to Judges Smith and Clarie per Judge Blumenfeld's Office.

4/27

Placed on Trial List.

5/17

Pre-Trial Memorandum, filed by Defendant at Hartford. Copy given to each Judge on 3-Judge panel.

5/19

Court Trial before 3-Judge Panel commences. w Plaintiff's witnesses sworn and testified. Both sides rest. Summation by counsel 11:43 A.M. to 12:57 P.M. Decision Reserved. Smith, USCJ; Clarie, USDJ; and Blumenfeld, USDJ. M-5/22/67

5/25

Court Reporter's Notes of Proceedings of 5/19/67, filed at Hartford. Sanders, R.

6/19

Memorandum of Decision, entered. Judgment may enter in favor of the plaintiff declaring the residence requirement of Sec. 17-2d of the Connecticut General Statutes invalid as applied to plaintiff awarding plaintiff monies unconstitutionally withheld, and enjoining defendant from denying plaintiff Aid to Dependent Children solely because of her failure to meet the one-year residence requirement. Form of decree, including computation of amount of damages due, may be submitted by counsel for plaintiff on notice to counsel for defendant. Smith, U.S.C.J.; Blumenfeld, U.S.D.J. *Copies mailed from Hartford to Attys. Hollander and MacGregor. Copies handed three judges. M-6/20/67. * Clarie, U.S.D.J. — Dissent

6/30

Court Reporter's Transcript of Proceedings of May 19, 1967, filed. Sanders, R.

6/30

Judgment entered that Chapter 299, Sec. 17-2d of the Connecticut General Statutes is invalid as applied to Plaintiff; that an injunction hereby issues permanently restraining and enjoining the Defendant and his successors, and all other persons responsible for the enforcement of the welfare law of Connecticut from the present and further enforcement of Chapter 299, Sec. 17-2d of the Connecticut General Statutes against the Plaintiff; that the defendant pay to the plaintiff the sum of $311.91, the sum of monies unconstitutionally withheld from the Plaintiff by the Defendant. Smith, U.S.C.J.; Blumenfeld, U.S.D.J.; Clarie, U.S.D.J. — Dissent. Copies mailed Attys. Hollander and MacGregor, Asst. Atty. Gen. M-7/5/67

7/18

Agreed Stipulation Of Facts, filed by Plaintiff, at Hartford

7/19

Supplemental Stipulation Of Facts, filed at Hartford by Plaintiff.

8/20

Notice Of Appeal to the Supreme Court of the United States with Affidavit of Service, filed by Defendant. Copy mailed Atty Hollander.

8/20

Motion For Supersedeas, filed by Defendant.
(Copies of Notice of Appeal and Motion For Supersedeas, w/cc of Order, mailed to Attorney Hollander and to Judges Smith, Blumenfeld, Clarie.

8/20

Original Motion for Supersedeas and original Order mailed to Judge Smith (per GCE).

8/26

Order Granting Supersedeas, entered. This cause came on to be heard on motion of defendant for a stay pending defendant's appeal to U.S. Supreme Court and it appearing to the Court that defendant is entitled to such a stay, it is ORDERED, that the execution of and any proceedings to enforce the judgment entered herein on June 30, 1967 be stayed pending the determination of defendant's appeal from such judgment. No bond is required. Smith, U.S.C.J.; Blumenfeld, U.S.D.J.; Clarie, U.S.D.J. M-7/26/67. Copies mailed to Attorneys Hollander and MacGregor, Ass't. Attorney General.

8/31

Designation of Additional Parts of the Record to be Included in the Transcript to the Supreme Court of the United States, filed by Plaintiff. Copies mailed to 3 Judges.

**5/18

Plaintiff's Pre-Trial Memorandum of Law, filed at Hartford.

**5/18

Appendix to Plaintiff's Pre-Trial Memorandum of Law, filed at Hartford.

8/11

Motion to Extend Time for Filing Record and Docketing Appeal (to and including Nov. 15, 1967), filed by Defendant. Copies mailed to Judges Smith, Blumenfeld and Clarie.

9/7

Order entered granting Defendant's Motion to Extend Time for Filing Record and Docketing Appeal, to and including Nov. 15, 1967. Smith, U.S.C.J.; Blumenfeld, J., U.S.D.J.; Clarie, J., U.S.D.J. Copies of Motion with Order endorsed thereon mailed aforementioned Judges and Attys. Hollander and MacGregor. M-9/7/67

COMPLAINT

United States District Court
District of Connecticut

VIVIAN MARIE THOMPSON
v.
BERNARD SHAPIRO, Commissioner of Welfare of the State of Connecticut } Civil Action # 11821

COMPLAINT

1. This action arises under Article IV, Section 2 (1) and Amendment XIV, Section 1, of the Constitution of the United States and United States Code, Title 28, Section 1343 (3), and Title 42, Sections 1983 and 1988. Jurisdiction is conferred upon

this Court by United States Code, Title 28, Sections 2281 and 2284.

2. Plaintiff, VIVIAN MARIE THOMPSON, is a resident of the City of Hartford and County of Hartford, a resident and taxpayer of the State of Connecticut, and a citizen of the United States and the State of Connecticut.

3. Defendant, BERNARD SHAPIRO, is the Commissioner of Welfare of the State of Connecticut, in which capacity he is charged with administering the Welfare Laws of said State. Connecticut General Statutes, Chapter 299, Section 17-2 (1965).

4. The Court has jurisdiction over the parties hereto and of the subject matter of the complaint, and as will fully appear from the facts hereinafter set forth, a justifiable issue is raised which entiles the Plaintiff to a declaratory judgment under United States Code, Title 28, Section 2201 as to the validity of the State Statute hereinafter put in issue.

5. The following Article of, and Amendment to, the Constitution of the United States are applicable to this action:

a. Article IV, Section 2 (1) provides:

"The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

b. Amendment XIV, Section 1, provides in pertinent part:

". . .No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States: . . . nor deny to any person within its jurisdiction the equal protection of the laws."

6. Section 17-85 of Chapter 302 of the Connecticut General Statutes establishes the standard to be applied by the

Connecticut Welfare Department in determining eligibility for categorical public assistance under the Aid to Families with Dependent Children program, Connecticut General Statutes, Chapter 302, Part II, Section 17-84 et seq. (1965). Said Section provides:

> "Any relative having a dependent child or dependent children, *who is unable to furnish suitable support therefor* in his own home, shall be eligible to apply for and receive the aid authorized by this part, for such dependent child or children and to meet such relative's own needs, if such applicant has not made an assignment or transfer or other disposition of property without reasonable consideration or for the purpose of qualifying for an award if such relative is to be supported wholly or in part under the provisions of this part; provided ineligibility because of such disposition shall continue only for that period of time from the date of disposition over which the fair value of such property, together with all other income and resources, would furnish support on a reasonable standard of health and decency; and provided no needy dependent child shall be deemed ineligible for assistance by reason of any such transfer or other disposition of property by a relative not legally liable for the support of such child. Each such dependent child shall be supported in a home in this state, suitable for his upbringing, which such relative maintains as his own. Aid shall not be denied any such dependent child on the ground that such relative is not a citizen of this state or of the United States. In the case of a child who reaches his eighteenth birthday during a school year and while in attendance at school, such aid shall continue for such child, so long as he attends school, until the end of such school year." (emphasis added).

7. Section 17-2d of Chapter 299 of the Connecticut General Statutes places limitations on the availability of categor-

ical public assistance to persons eligible under Section 17-85, on the basis of the length of time that they have resided in Connecticut and their economic condition at the time that they entered the State. Said Section provides:

> "When any person comes into this state *without visible means of support for the immediate future* and applies for aid to dependent children under Chapter 301 (sic.) or general assistance under Part I of Chapter 308 *within one year from his arrival,* such person shall be eligible only for temporary aid or care until arrangements are made for his return . . ." (emphasis added).

8. Section 17-3d of the Connecticut General Statutes, as interpreted and enforced by the Connecticut Welfare Department, only authorizes the denial of categorical public assistance to certain categories of indigent residents of the State of Connecticut during their first year of residence in said State; indigent residents not falling within these categories are eligible for assistance within the one year period set out in said Statute. Chapter II, Section 219.1 of the Regulations contained in the Manual of said Department sets out the categories of residents to whom assistance is to be denied:

> "1. Persons or families who arrive in Connecticut without specific employment.
>
> 2. Those arriving without regular income or resources sufficient to enable the family to be self-supporting in accordance with Standards of Public Assistance.
>
> 3. 'Immediate future' means within three months after arriving in Connecticut.
>
> NOTE: Support from relatives or friends, or from a public, private, or voluntary agency for three months after arrival will not satisfy the requirements of the

law, which relates to self-support rather than to dependency."

9. Plaintiff is 19 years old and unwed. Her formal education ended during her junior year in Dorchester public high school, Dorchester, Massachusetts. She is the mother of a thirteen month old boy and a two week old girl.

10. For eight months preceding the month of September, 1966, Plaintiff and her son Bruce, while residing at 9 Greenwood Street, Dorchester, Massachusetts, received continuous public assistance from the City of Boston under that City's Welfare Program.

11. Plaintiff's mother, Mrs. Bessie Harper, of 1215 Main Street, Hartford, Connecticut, has continuously resided in said City for approximately eight years. During this period of time, she has provided the Plaintiff with periodic financial assistance as permitted by her income, and has visited and written to the Plaintiff at her residence in Massachusetts.

12. Plaintiff was encouraged by her mother to take up residence in Hartford, Connecticut, with the assurance that her mother would assist her financially, to whatever extent possible.

13. Plaintiff, having no knowledge of her natural father's whereabouts, and having been denied assistance, financial and otherwise, by her relatives in the Boston area, moved herself and her son to Hartford, Connecticut, in June 1966, so as to be near her mother, the only person who was taking any interest in her life at that time.

14. Upon arriving in Hartford, Plaintiff and her son immediately moved in with her mother at the latter's quarters at the Empire Hotel, 1215 Main Street, Hartford, Connecticut, where she and her son resided continuously until on or about

August 26, 1966, at which time Plaintiff and her son moved to 25 Florence Street, Hartford, Connecticut.

15. During said period, Plaintiff's sole sources of support were her mother's contributions of housing and food and the remaining public assistance benefits which she received from Massachusetts. She moved to her own quarters because it became financially impossible for her mother to assist her and her son on her present income. At the time that she moved, Plaintiff did not attempt to return to Massachusetts; her only intention was to find suitable quarters elsewhere in Hartford.

16. Plaintiff was five months pregnant when she stopped receiving financial assistance from her mother. She was soley responsible for the daily care of her son, and was without sufficient funds to hire a babysitter. For these reasons, Plaintiff was prevented from either seeking gainful employment so as to be able to support herself and her son, or from enrolling in a work training program under the Manpower Development Training Act administered by the State Welfare Department.

17. On September 7, 1966, Plaintiff, being solely responsible for the support of herself and her son and being without any means to accomplish such support, filed an application with the Hartford Department of Public Welfare requesting public assistance from said agency.

18. On September 8, 1966, Plaintiff's application was approved, and Plaintiff received her initial assistance check from said agency. At that time, Plaintiff was advised that the assistance which she was receiving from said agency was only temporary and that she would have to make application to the Connecticut Welfare Department if she wished to received public assistance on a continuing basis. She was also advised of the improbability of her receiving such assistance because of the statute, herein in issue. Plaintiff declined, however, to accept assistance from the Hartford Department of Public Wel-

fare for the purpose of returning to Massachusetts for the reason that she wished to continue residing in Hartford.

19. On September 7, 1966, Plaintiff first filed her application with the Connecticut Welfare Department requesting categorical public assistance under the Aid to Families with Dependent Children program, Connecticut General Statutes, Chapter 302, Section 17-84 (1965). Said application was denied on September 26, 1966, without investigation into the merits.

20. October 3, 1966, Plaintiff reapplied to the Connecticut Welfare Department for categorical public assistance. That application was processed on its merits and on November 1, 1966, said application was denied because of the failure of the Plaintiff to meet the statutory requirements set forth in Section 17-2d of the Connecticut General Statues. The language used by the State Welfare worker in denying said application was: "Deny (sic.) because of residency — "Those arriving without regular income or resources sufficient to enable the family to be self-supporting in accordance with Standards of Public Assistance.'"

21. Within the time prescribed by Statute, Connecticut General Statutes, Chapter 299, Section 17-2a and 17-2b (1965). Plaintiff filed her application with the Connecticut Welfare Department requesting that a fair hearing be held to review the decision denying her application for categorical public assistance.

22. On December 16, 1966, a fair hearing was held by Connecticut Welfare Department. Plaintiff appeared personally, represented by her attorney. At said hearing, Plaintiff admitted that she did not meet the statutory requirements of Section 17-2d of the Connecticut General Statutes, but maintained that it was unlawful to deny her application on that basis because said Statute contravenes the United States Constitution. The Welfare Department upheld the decision of the

District Office that Plaintiff does not qualify for assistance because she fails to meet said statutory requirement.

23. Pursuant to its regulation that all temporary assistance must be terminated following a final decision by the State Welfare Department denying an applicant assistance, the Hartford Department of Public Welfare notified the Plaintiff that it would have to terminate all assistance to her immediately.

24. Plaintiff then notified the Hartford Department of Public Welfare of the pendency of this action and requested their assistance in locating a charitable organization to assist her with support pending a final judicial determination of her case. Catholic Family Services of Hartford agreed to assume this burden and as of January 25, 1967, began making weekly payments to the Plaintiff in the amount of $31.60; said payments will continue *only* until a final determination of this action is made.

25. Section 17-2d of the Connecticut General Statutes, on its face and as administered pursuant to Chapter II, Section 219 et seq. of the State Welfare Manual, violates the equal protection clause of Amendment XIV, Section I of the United States Constitution in that it arbitrarily and unreasonably discriminates:

(a) between newly arrived residents of the State of Connecticut by denying Welfare benefits to only certain categories of said residents during their first year of residency;

(b) against newly arrived residents of the State of Connecticut during their first year of residency by denying to them the protection which the Connecticut Welfare Laws afford to all who have resided in Connecticut for more than one year;

in both instances, without a constitutionally justifiable basis.

26. Section 17-2d of the Connecticut General Statutes violates the Priyileges and Immunities Clause of both Article IV, Section 2 (1) and Amendment XIV, Section 1 of the United States Consutution in that:

(a) by authorizing the denial of public assistance to newly arrived indigent residents who wish to remain in Connecticut, it is designed to deter such persons from choosing Connecticut as their place of permanent residence;

(b) by authorizing public assistance to newly arrived indigent residents only until necessary arrangements can be made to return them to their state of last residence, it is designed to force such persons to involuntarily leave Connecticut; all in violation of the constitutionally protected right of a citizen of the United States to travel to and relocate in the State of one's choice.

27. The Plaintiff will suffer irreparable harm, for which there is no plain, adequate, and complete remedy at law, if the Connecticut Welfare Department is permitted to continue to enforce Section 17-2d of the Connecticut General Statutes so as to deny her the Welfare benefits for which she qualifies under Section 17-85 of said Statutes. Said continued enforcement would result in her being deprived of the necessary funds with which to purchase food, clothing, shelter and the other necessities needed to provide herself and her family with a minimal standard of living reflecting health and decency. Also, the continued enforcement of said Statute would prevent the Plaintiff from engaging in a normal relationship with her mother, and would also deny to her the desired opportunity to pursue educational and job training benefits available to other residents of Connecticut who are eligible for categorical public assistance under Section 17-85 of the Connecticut General Statutes. Plaintiff is unable to accomplish these things by herself since she is unable to accept gainful employment because

of her duties in the household, and is without the benefit of assistance from legally responsible relatives.

WHEREFORE, the Plaintiff herein respectfully prays that:

(a) This Court take jurisdiction of this matter;

(b) A special three judge court be called pursuant to Title 28, Section 2281 et seq., to hear and determine the issues;

(c) This Court declare and make it its judgment that Chapter 299, Section 17-2d, Connecticut General Statutes, is unlawful and unenforceable in that it contravenes the Constitution of the United States;

(d) This Court decree that the Defendant and his successors, and all other persons responsible for the enforcement of the Welfare Laws of Connecticut, be permanently restrained and enjoined from the present and future enforcement of Chapter 299, Section 17-2d of the Connecticut General Statutes;

(e) The Defendant be ordered to make retroactive payments to the Plaintiff from November 1, 1966, the date on which Plaintiff's application was illegally denied.

(f) For such other and further relief as the Court may deem proper.

Dated at Hartford, Connecticut, this 14th day of February, 1967.

PLAINTIFF,

By /s/ Brian L. Hollander
BRIAN L. HOLLANDER
(Neighborhood Legal Services, Inc.
Hartford, Connecticut)
Her Attorney

ANSWER

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

VIVIAN MARIE THOMPSON, *Plaintiff*

vs.

BERNARD SHAPIRO, Commissioner Of Welfare, State of Connecticut, *Defendant*

Civil Action No. 11821

March 31, 1967

ANSWER

FIRST DEFENSE

The Complaint fails to state a claim against the defendant upon which relief can be granted.

SECOND DEFENSE

The Court lacks jurisdiction as poor relief is a state not a federal question.

THIRD DEFENSE

1. The defendant admits the allegations in paragraphs 1, 3, 5, 6 through 10, 17, 18, and 20 through 24 of the complaint.

2. The defendant admits the allegation in the first sentence of paragraph 19 of the complaint.

3. The defendant denies the allegations in paragraph 4, 25 and 26 and also the allegation in last sentence in paragraph 19 of the complaint.

4. As to paragraphs 2, and 11 through 16 and also paragraph 27 of the complaint, the defendant alleges he is without sufficient knowledge or information to form a belief as to the truth of these allegations and therefore

denies them and leaves the plaintiff to her proof.

FRANCIS J. MACGREGOR
Attorney for the Defendant

FRANCIS J. MACGREGOR
Assistant Attorney General
1000 Asylum Avenue
Hartford, Connecticut

I hereby certify that a copy of the foregoing, Answer was served upon the plaintiff's attorney by addressing duplicate copies thereof to the office of Brian Hollander, Attorney, Neighborhood Legal Services, Inc., 76 Pliny Street, Hartford, Connecticut, and enclosing the same in a stamped envelope and depositing the same in a U.S. Mailbox on the 31st day of March, 1967.

FRANCIS J. MACGREGOR
Attorney for the Defendant

OPINION

United States District Court
District of Connecticut

VIVIAN MARIE THOMPSON
v.
BERNARD SHAPIRO, Commissioner of Welfare of the State of Connecticut } Civil No. 11,821

Before: SMITH, Circuit Judge, Blumenfeld and Clarie, District Judges.

MEMORANDUM OF DECISION

SMITH, Circuit Judge:

This action was brought in the United States District Court for the District of Connecticut under Title 28 U. S.

Code, §§2281 and 2284, seeking a declaration that Chapter 299, §17-2d of the Connecticut General Statutes is unlawful as in violation of the Constitution of the United States and seeking an injunction against its enforcement and payment of monies unconstitutionally withheld. A three-judge district court was convened pursuant to the statute, hearings were held, briefs were filed and arguments were made. Notification of pendency of the action was given to the United States because of possible effect on federal statutes, and the Solicitor General notified the court of his decision that the United States would not intervene in the case.[1] The court has considered the stipulations of facts, the testimony taken, the briefs and arguments of the parties, and finds the issues in favor of the plaintiff.

In June of 1966, Vivian Marie Thompson, the plaintiff in this action, and a citizen of the United States, moved from Boston, Massachusetts, to Hartford, Connecticut. Plaintiff's purpose in moving was to live near her mother. Then the mother of one and now the mother of two, plaintiff had been receiving Aid to Dependent Children (ADC) from the City of Boston. Boston discontinued this aid in September because of plaintiff's change of residence. When she applied for similar assistance to Bernard Shapiro, Commissioner of Welfare of the State of Connecticut and the defendant in this proceeding, he denied ADC to her on November 1 because plaintiff, although she was otherwise eligible, had not met the one year residence requirement of Conn. Gen. Stat §17-2d which provides as follows:

> "When any person comes into this state without visible means of support for the immediate future and

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[1]The state moved to have the court apply the doctrine of equitable abstention. The court, however, declined to exercise its discretionary equity powers because, " the state statute in question . . . is not fairly subject to an interpretation which will render unnecessary or substantially modify the federal constitutional question . . ."*Harman v. Forsenius*, 380 U.S. 528, 534-35 (1965).

applies for Aid to Dependent Children under Chapter 301 or general assistance under Part I of Chapter 308 within one year from his arrival, such person shall be eligible only for temporary aid or care until arrangements are made for his return, provided ineligibility for Aid to Dependent Children shall not continue beyond the maximum federal residence requirement."

As can be seen, it was to insure continuation of the state's right to receive the substantial payments which the Federal Government pays to the state for federally approved plans of state aid to needy families with children that §17-2d is keyed to the federal limitation on residence requirements. At the present time, the Social Security Act, 49 Stat. 627 (1935), as amended, 42 U. S. C. §602(b) (1959), limits the length of the period of prior residence which a state can require as a condition of eligibility to one year in order to obtain such approval. Thus ADC programs are financed jointly by the State and Federal Governments and generally the responsibility is shared aproximately equally. Some states, like Connecticut, impose the maximum residence requirement allowed by §602(b); other require a shorter period of residence, or none at all. The Catholic Family Services of Hartford have been supporting plaintiff pending the outcome of this action; these private payments, however, are below Connecticut's ADC level. See, *Harvith, The Constitutionality of Residence Tests for General and Categorical Assistance Programs*, 54 Calif. L. Rev. 567, 569 n. 28 (1966) which cites as its authority, NATIONAL TRAVELERS AID ASS'N., ONE MANNER OF LAW — A HANDBOOK ON RESIDENCE REQUIREMENTS IN PUBLIC ASSISTANCE 8-13 (1961).

The Welfare Department of the State of Connecticut has promulgated regulations which construe in the following manner the words "without visible means of support for the immediate future" contained in §17-2d:

1. Persons or families who arrive in Connecticut without specific employment.

2. Those arriving without regular income or resources sufficient to enable the family to be self-supporting in accordance with Standards of Public Assistance.

3. "Immediate future" means within three months after arriving in Connecticut.

NOTE: Support from relatives or friends, or from a public, private, or voluntary agency for three months after arrival will not satisfy the requirements of the law, which relates to self-support rather than to dependency.

Connecticut Welfare Manual, Vol. 1, Ch. II, §219.1.

In accord with the above, the regulations further provide:

1. If the application for assistance is filed within one year after arrival in Connecticut, the applicant must establish that he was self-supporting upon arrival and for the succeeding three months thereafter; or

2. If the application for assistance is filed within one year after arrival in Connecticut, the applicant must clearly establish that he came to Connecticut with a bona fide job offer; or

3. If the application for assistance is filed within one year after arrival in Connecticut, the applicant must establish that he sought employment and had sufficient resources to sustain his family for the period during which a person with his skill would noramlly be without employment while actively seeking work. Personal resources to sustain his family for a period of three months is considered sufficient. Those who come to Connecticut for seasonal employment such as work in tobacco or short term farming are not deemed to have moved with the intent of

establishing residence in Connecticut.

Connecticut Welfare Manual, Vol. 1, Ch. II, §219.2.

Thus, Connecticut withholds ADC for one year to newly-arrived residents unless they come to Connecticut with substantial employment prospects or a certain cash stake.

Plaintiff came to Connecticut with neither the prospect of employment nor the necessary cash stake. It is her contention in this action that Connecticut's denial of ADC results in an unlawful discrimination violative of her constitutional rights under the equal protection and privileges and immunities clauses of the Fourteenth Amendment and the privileges and immunities clause of Art. IV. §2. Plaintiff contends that Connecticut discriminates against her in favor of three classes of persons: newly-arrived residents with employment, newly-arrived residents with a stake and residents of one year's duration.

At the outset, it will be helpful to highlight what is at issue here by excluding what is not. Plaintiff does not argue that Connecticut cannot deny ADC to non-residents. Since plaintiff is a citizen of Connecticut, her reliance on the privileges and immunities clause of Art. IV. §2 is misplaced; that clause only outlaws discrimination by one state against citizens of another state. *New York v. O'Neill*, 359 U.S. 1, 6 (1959). We have no question of the state's power under the Tenth Amendment to provide for relief to the indigent, whether by state agencies, town agencies or otherwise. Nor is any claim made here of a local, state or federal constitutional duty to provide aid at all, or any kind or amount of aid. What we do have is a claim that a state may not discriminate by arbitrarily classifying those who shall and those who shall not be provided with aid, because such discrimination violates rights guaranteed by the first section of the Fourteenth Amendment to the Constitution of the United States.

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Plaintiff's argument based on privileges and immunities is premised primarily on the right of interstate travel. That right, so the argument goes, is abridged by Connecticut's practice of denying ADC to those in plaintiff's situation because it chills their mobility. The existence, source and dimensions of the right to travel have been the subject of much constitutional debate. In *Edwards* v. *California*, 314 U.S. 160 (1941), the Court struck down a California statute which made it a misdemeanor to bring an indigent non-resident into the state. The rationale of the majority was that the statute violated the Commerce Clause. Mr. Justice Jackson, concurring, would have held that the statute abridged the state citizenship and privilege and immunities clauses of the Fourteenth Amendment. 314 U.S. at 181-86. Mr. Justice Douglas, joined by Justices Black and Murphy, would also have rested on the privileges and immunities clause. 314 U.S. at 177-81. In the passport cases, which deal with the right of foreign travel, the Court relied on Fifth Amendment notions of liberty. *Zemel v. Rusk*, 381 U.S. 1, 14 (1965); *Aptheker* v. *Secretary of State*, 378 U.S. 500, 505-06 (1964); *Kent* v. *Dulles*, 357 U.S. 116, 126-27 (1958). Finally, in *United States* v. *Guest*, 383 U.S. 745, 759 (1966), the Court ruled that, "Although there have been recurring differences in emphasis within the Court as to the source of the constitutional right of interstate travel, there is no need here to canvass those differences further. All have agreed that the right exists." The Court thereby

quieted any doubts that might have remained about the existence of the contstitutional right of interestate travel but left unanswered questions regarding its source and dimensions. The defendant contends that the plaintiff is not deprived of the right to travel and to settle in Connecticut since she may do so freely so long as she does not seek welfare benefits until after she has resided here for a year.

Whether or not the state citizenship clause and the privileges and immunities clause[2] are the as yet unnamed source of the right of interstate travel, Mr. Justice Jackson's concurrence in *Edwards,* which as mentioned above was based on those clauses, delineates in timeless language the dimensions of the right.

> . . . it is a privilege of citizenship of the United States,

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[2]To abridge the privileges and immunities clause of the Fourteenth Amendment, the challenged state action must contravene a right inherent in national, as opposed to state, citizenship. *Adamson v. California,* 332 U.S. 46, 52-53 (1947). The Supreme Court has seldom defined a right of national citizenship. See, *Colgate v. Harvey,* 296 U.S. 404, 436 (1935) (Stone, J., dissenting) overruled *Madden v. Kentucky,* 309 U.S. 83 (1940); *Hague v. CIO,* 307 U.S. 496, 520-21 n. 1 (1939) (Stone, J., concurring). According to Mr. Justice Douglas, "judicial reluctance to expand the content of national citizenship . . . has been due to a fear of creating constitutional refuges for a host of rights historically subject to regulation." *Bell v. Maryland,* 378 U.S. 226, 242, 250 (1964) (Douglas, J., concurring). Nevertheless, there is continuous and abundant judicial recognition that the privileges and immunities clause means something. See the cases cited *supra* in this footnote and e.g., *United States v. Guest,* 383 U.S. 745, 762, 764-67 (1966) (Harlan, J., concurring and dissenting); *New York v. O'Neill,* 359 U.S. 1, 12, 13 (1959) (Douglas, J., dissenting). See also, *Oyama v. California,* 332 U.S. 633, 640 (1948) which speaks of "privileges as an American citizen". An *en banc* decision of the Court of Appeals for the Second Circuit, *Spanos v. Skouras Theatres Corp.,* 364 F. 2d 161, 170 (2d Cir.), cert. denied, 385 U.S. 987 (1966), stated among other reasons for its decision, that:

> under the privileges and immunities clause of the Constitution no state can prohibit a citizen with a federal claim or defense from engaging an out-of-state lawyer to collaborate with an in-state lawyer and give legal advice concerning it within the state.

As quoted in the text, *infra,* "If national citizenship means less than" the right "to enter any State of the Union, either for temporary sojourn or for the establishment of permanent residence therein and for gaining resultant citizenship thereof . . . it means nothing." *Edwards v. California,* 314 U.S. 160, 181, 183 (1941) (Jackson, J., concurring).

> protected from state abridgement, to enter any state of the Union, either for temporary sojourn or for the establishment of permanent residence therein and for gaining resultant citizenship thereof. If national citizenship means less than this, it means nothing.
>
> State citizenship is ephemeral. It results only from residence and is gained or lost therewith. That choice of residence was subject to local approval is contrary to the inescapable implications of the westward movement of our citvilization. 314 U.S. at 183.
>
> Any measure which would divide our citizenry on the basis of property into one class free to move from state to state and another class that is poverty-bound to the place where it has suffered misfortune is not only at war with the habit and custom by which our country has expanded, but is also a short-sighted blow at the security of property itself. Property can have no more dangerous, even if unwitting, enemy than one who would make its possession a pretext for unequal or exclusive civil rights. Where those rights are derived from national citizenship no state may impose such a test, and whether the Congress could do so we are not called upon to inquire. 314 U.S. at 185.

In short, the right of interstate travel embodies not only the right to pass through a state but also the right to establish residence therein.

While prior "right to travel cases" have been concerned with absolute proscriptions on movement, *Guest* may be read as proscribing the discouragement of interstate travel. The Court there upheld a paragraph of an indictment based on 18 U. S. C. §241 which outlaws conspiracy to interfere with rights or privileges secured by the Constitution. The paragraph charged interference with, "The right to travel freely to and

from the State of Georgia and to use highway facilities and other instrumentalities of interstate commerce within the State of Georgia." 383 U.S. at 757. The Court went on to say that, "if the predominant purpose of the conspiracy is to impede or prevent the exercise of the right of interstate travel, or to oppress a person because of his exercise of that right, then, whether or not motivated by racial discrimination, the conspiracy becomes a proper object of the federal law under which the indictment in this case was brought." 383 U.S. at 760. By employing the words "impede" and "oppress", the Court must have contemplated that the discouragement of interstate travel is also forbidden. Further support for the proposition that the right of interstate travel also encompasses the right to be free of discouragement of interstate movement may be found by analogy to cases proscribing actions which have a chilling effect on First Amendment rights. See *Dombroski* v. *Pfister*, 380 U.S. 479, 487 (1965); *Wolff* v. *Selective Service Local Board No.* 16, 372 F. 2d 817 (2d Cir. 1967). Finally, it should be italicized that the statute invalidated in *Edwards* penalized the sponsor of the indigent, not the indigent himself. In short, whatever its source, the right to travel exists and included within its dimensions is the right to establish residence in Connecticut. Denying to the plaintiff even a gratuitous benefit because of her exercise of her constitutional right effectively impedes the exercise of this right. See *Sherbert* v. *Verner*, 374 U.S. 398, 405-06 (1963). Because Conn. Gen. Stat. §17-2d has a chilling effect on the right to travel, it is unconstitutional.

Not only does §17-2d abridge the right to travel and its concomitant right to establish residence, but it also denies plaintiff the equal protection of the laws. "Judicial inquiry under the Equal Protection Clause . . . does not end with a showing of equal application among the members of the class defined by the legislation. The courts must reach and determine the question whether the classifications drawn in a sta-

tute are reasonable in light of its purpose . . ." *McLaughlin* v. *Florida*, 379 U.S. 184, 191 (1964). Connecticut states quite frankly that the purpose of §17-2d is to protect its fisc by discouraging entry of those who come needing relief.[3] The state has not shown that any significant number come for that purpose, and the evidence indicates that most of the class discriminated against coming for other purposes, such as, hope of employment, to be with relatives in time of need, as in the case of plaintiff, or to resume residence in Connecticut after a period of absence. Even a classification denying aid to those whose sole or principal purpose in entry is to seek aid, however, would not be sustainable. Anyway, the classification made here, based not on purpose in coming but solely on indigency, hits most heavily those with not even an arguably bad purpose in coming and may not be upheld. As detailed above, the purpose of §17-2d, to discourage entry by those who come needing relief, abridges the right to travel and to establish residence. A similar purpose was behind the statute invalidated in *Edwards*. California in *Edwards*, like Connecticut here, tried to justify its statute under the police power.

> Their coming here has alarmingly increased our taxes and the cost of welfare outlays, old age pensions, and the care of the criminal, the indigent sick, the blind and the insane.
>
> Should the states that have so long tolerated, and even

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[3]The legislative history further demonstrates that this is the purpose of §17-2d. For example, Mr. Cohen, while recognizing that only a small proportion of new arrivals come to Connecticut to seek welfare, made the following argument in favor of §17-2d:

> If we pass this Bill, the word could get around that we are not an easy state, and the rate of influx might relate more closely to the level of job opportunity. As responsible legislators we must, at some point, be interested in costs. I doubt that Connecticut can, or should continue, to allow unlimited migration into the State, on the basis of offering instant money and permanent income to all who can make their way to the State, regardless of their ability to contribute to the economy.

Connecticut General Assembly 1965. House of Representatives Proceedings, Vol. II Part 7, pp. 194-95 (Connecticut State Library).

> fostered, the social conditions that have reduced these people to their state of poverty and wretchedness, be able to get rid of them by low relief and insignificant welfare allowances and drive them into California to become our public charges, upon our immeasurably higher standard of social services? Naturally, when these people can live on relief in California better than they can by working in Mississippi, Arkansas, Texas or Oklahoma, they will continue to come to this State. 314 U.S. at 168.

Here, as there, the burden on the state treasury[4] does not justify an enactment with an invalid purpose.

The policy behind the equal protection clause has long been interpreted as that of preventing states from discriminating against particular classes of persons. *E.g., Yick Wo* v. *Hopkins,* 118 U.S. 356 (1886). Even if the purpose of §17-2d were valid, which it is not, the classifications established by the statute and the regulations promulgated thereunder are not "reasonable in light of its purpose." Admittedly, the classifications are not drawn on the presumptively suspect lines of race, creed or color. Nor, at the time application for aid is made, can it be said that they are based on poverty; for, at that time, all bona fide applicants are indigent. Furthermore, no inquiry is made into the assets at any past point in time of those applicants who enter with a job or those who have one year's residence. But there is a classification based on wealth between those who enter with a cash stake and those like plaintiff who do not. This classification is invalid because there is no showing that in the long run the applicant with the cash would be a lesser drain on the state treasury. Similarly, even though they are not based on wealth, the clas-

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[4]Incidentally, a small part of Connecticut's ADC budget is involved and the burden on the state treasury is not overwhelming. Connecticut estimates that the indigent who would come in should plaintiff prevail would cost another 2% in ADC, that is, some $2,000,000 annually. Approximately half of this sum, of course, would be paid by federal appropriation through Congressional recognition of the national nature of the problem.

sifications of one year's residence or a job are not reasonable in the light of the purpose of §17-2d because again there is no showing that those applicants will be lesser burdens than applicants without jobs or one year's residence. Section 17-2d, in brief, violates the equal protection clause because even if its purpose were valid, which it is clearly not, the classifications are unreasonable.

Granted, the state may provide assistance in a limited form with restrictions, so long as the restrictions are not arbitrary; but, in any case where the government confers advantages on some, it must justify its denial to others by reference to a constitutionally recognized reason. See *Sherbert* v. *Verner*, supra; *Speiser* v. *Randall*, 357 U.S. 513 (1958). In *Carrington* v. *Rash*, 380 U.S. 89, 96 (1965), while striking down a Texas law which prevented servicemen from voting, the Court was careful to emphasize that, "Texas is free to take reasonable and adequate steps . . . to see that all applicants for the vote actually fulfill the requirements of bona fide residence." For example, if there were here a time limit applied equally to all, for the purpose of prevention of fraud, investigation of indigency or other reasonable administrative need, it would undoubtedly be valid. Connecticut's Commissioner of Welfare frankly testified that no residence requirement is needed for any of these purposes.

Judgment may enter in favor of the plaintiff declaring the residence requirement of §17-2d of the Connecticut General Statutes invalid as applied to plaintiff, awarding plaintiff monies unconstitutionally withheld,[5] and enjoining defendant

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[5]That a state cannot be sued without its consent, *Monaco v. Mississippi*, 292 U.S. 313 (1934), is no barrier to awarding money damages here; for, in *Ex Parte Young*, 209 U.S. 123 (1908), the Court held that the Eleventh Amendment did not prevent a suit against a state official who was acting unconstitutionally. Consequently, this court can order Commissioner Shapiro to tender monies which he unconstitutionally withheld. See, *Department of Employment v. United States*, 385 U.S. 355, 358 (1966) where the Court ordered refund of taxes unconstitutionally paid. See also, *Sherbert v. Verner*, 374 U.S. 398 (1963) (unemployment benefits).

from denying plaintiff Aid to Dependent Children solely because of her failure to meet the one-year residence requirement. Form of decree, including computation of amount of damages due, may be submitted by counsel for plaintiff on notice to counsel for defendant.

The above shall serve as the Findings of Fact and Conclusions of Law required by Fed. R. Civ. P. 52(a).

Dated at Hartford, Connecticut, this 19th day of June, 1957.

J. JOSEPH SMITH
United States Circuit Judge

M. JOSEPH BLUMENFELD
United States District Judge

I dissent, with opinion.

T. EMMET CLARIE
United States District Judge

CLARIE, DISTRICT Judge, dissenting:

I respectfully dissent and disagree with the majority opinion that §17-2d of the Connecticut General Statutes is unconstitutional. The residence time qualification for welfare eligibility of non-residents coming into the State, as contained in the law, is a reasonable one directly related to the problem sought to be governed. It is a valid legislative classification, which the State has the discretion and authority to enact. It is not within the province of the judiciary to determine whether the remedy chosen is a wise one, but only whether it is constitutional. *Railway Express* v. *New York*, 336 U.S. 106, 109 (1949); *Daniel* v. *Family Ins. Co.*, 336 U.S. 220, 224-25 (1949); *Olsen* v. *Nebraska*, 313 U.S. 236, 246-47 (1941).

Forty other states of the United States, including Connecticut, have established a one-year residence requirement, as a condition of eligibility to qualify for aid to families with dependent children.[1] Congress itself has sanctioned the laws of these forty states, by enacting 42 U. S. C. A. §602 (b), which provides for a federal contribution to state administered programs, where the condition of eligibility does not exceed a one-year prior residence. As a practical matter, most states require a residence eligibility requirement or waiting period for all forms of welfare benefits.[2]

The majority opinion concedes that the purpose of §17-2d is to protect the state's fiscal responsibilities by discouraging entry of those who come into the state seeking relief.[3] It goes even further and asserts that a classification denying aid to those whose sole or principal purpose in entering the state to seek aid would be unconstitutional. The principal basis for the majority position is that the law abridges the right of freedom to travel and to establish residence; and that because such a statute as §17-2d has a chilling effect on the right to travel, it is therefore unconstitutional. The landmark case cited to support this position is *Edwards* v. *California*, 314 U.S. 160 (1941).

The latter case can be distinguished from the issue being litigated here. It involved a state statute, which made it a crime to transport across the state line into California, one

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[1](a) Stipulation of the Parties, Para. 61.
(b) States which do not have any waiting period are Alaska, Georgia, Hawaii, Kentucky, Maine, North Dakota, South Dakota, New York, Rhode Island, and Vermont. *Pocket Data Book USA*, 1967, U.S. Dept. of Commerce, Statistical Reports Division, Lib. Cong. Card No. A66-7638.

[2]Some thirty-five (35) states require that an applicant must have resided within the state five of the preceding nine years, including the immediate past year to be eligible to receive old age, deaf and blind benefits. Five (5) other states require simply a one-year residence to receive these benfits. See, *Characteristics of State Public Assistance Plans Under the Social Security Act*, U.S. Gov. Print. Off. (1965). Also see, 42 U.S.C.A. §§ 1202, 1352.

[3]*Supra*, note 1(b) at 182.

who was an indigent. This statute was ruled unconstitutional by the United State Supreme Court, because it not only restricted commerce between the several states, but it also actually limited the right of citizens to travel freely between the several states. On the contrary, the statute which is now in issue, does not prohibit travel between the states as such. What it does do and is intended to do, is to deter those who would enter the state for the primary or sole purpose of receiving welfare relief allotments.

Connecticut is comparatively generous in welfare grants. The legislature provides an open-end budget in its biennial appropriations to the State Welfare Department,[4] so that no qualified applicant may be denied aid or caused personal hardship by delay or the arbitrary limitation of budgetary appropriations. Connecticut ranks fourth among all the states, with monthly payments of $197.00 (46% contributed by the Federal Government) for a family of four, compared with the national average of $148.00. An extreme comparison is had by comparing the average monthly payments for a similar family unit in Mississippi of $33.00; in Alabama, $48.00; in Florida, $60.00, and in South Carolina, $64.00. In these latter states, the Federal Government contributes 83%, the state 17%.[5] Thus by way of illustration and comparison, the State of Connecticut's monthly contribution is $109.00 compared with that of Mississippi's of $5.50. It should be noted that §17-2d applies both to the general assistance allotments under §17-273, Part I, Chapter 308, for which no federal contribution is provided, as well as to Chapter 301, Aid to Dependent Children. Uncontrolled demands upon Connecticut's welfare program could effect an overall reduction of aid paid to eligible beneficiaries. It is a proper function of the legislature to enact such reasonable statutory controls, under the police

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[4]CONN. GEN. STAT. (Rev. 1958) § 4-95.
[5]Stipulation of Parties, Para. 58, 59.

powers reserved to the state in the Federal Constitution,[6] that its obligations to aid the needy of the state may continue to be generously fulfilled. *Missouri, Kansas & Texas Railway* v. *Haber,* 169 U.S. 613, 629 (1898).

The United States Supreme Court recognized the problem when it upheld the constitutionality of the Federal Social Security Act:

> "A system of old age pensions has special dangers of its own, if put in force in one state and rejected in another. The existence of such a system is a bait to the needy and dependent elsewhere, encouraging them to migrate and seek a haven of repose. . . ." *Helvering* v. *Davis,* 301 U.S. 619, 644 (1937).

Connecticut has always freely exercised its sovereign right as a state, to legislate and administer welfare governing a myriad of comparable state services. A needy student, to be eligible for a scholarship loan, must have resided within the state for the twelve (12) months previous to his application;[7] to receive aid to send a blind child for instructions, both the child and one of his parents or guardians must have resided within the state for one (1) year preceding the application.[8] To be an elector, one must have resided within the state for six months.[9] To be eligible to hold a liquor permit one must first be an elector.[10] With certain specified exceptions, a one year's residence is a prerequisite to applying for employment in the state merit system.[11] A plaintiff in a divorce action must have resided in the state continuously for three (3) years prior to bringing an action, unless the cause arose subsequent to res-

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[6]Art. X, Amendment to the Constitution of the United States.
[7]CONN. GEN. STAT. (Rev. 1958) § 10-116(c).
[8]CONN. GEN. STAT. (Rev. 1958) § 10-295(b).
[9]CONN. GEN. STAT. (Rev. 1958) § 9-12.
[10]CONN. GEN. STAT. (Rev. 1958) § 30-45(3).
[11]CONN. GEN. STAT. (Rev. 1958) § 5-39.

idence within the state.[12] The captains and members of the crew of oyster boats, in order to be licensed must have a one-year residence,[13] as well as those who would take scallops from state waters;[14] and so on ad infinitum.

Are these residence requirements established through several generations of orderly state growth, now to be struck down as constituting a constitutionally unlawful discrimination between the citizens who have just moved into the state and those who meet these reasonable statutory requisites? Such a decree by judicial fiat would go far toward completing the annihilation of the police powers, which were reserved to the several states and to the people under the Tenth Amendment to the Federal Constitution.

It is not within the province of this Court to pass upon the state legislature's wisdom in causing the enactment of this law, but whether or not the law violates the constitutionally guaranteed rights of its citizens. As Mr. Justice Frankfurter said in *Board of Education* v. *Barnette*, 319 U.S. 624, 647 (1942):

> "It can never be emphasized too much that one's own opinion about the wisdom or evil of a law should be excluded altogether when one is doing one's duty on the bench. The only opinion of our own even looking in that direction that is material is our opinion whether legislators could in reason have enacted such a law."

A historical review of the legislative act which preceded §17-2d illuminates and discloses the true purpose of this law. §1, Public Act No. 501, 1963 Connecticut General Assembly provided:

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[12]CONN. GEN. STAT. (Rev. 1958) § 46-15.
[13]CONN. GEN. STAT. (Rev. 1958) § 26-212.
[14]CONN. GEN. STAT. (Rev. 1958) § 26-288.

"When any person comes into this state without visible means of support for the immediate future and applies for Aid to Dependent Children under Chapter 301 or general assistance under Part I of Chapter 308 of the General Statutes within one month from his arrival, the welfare commissioner shall determine whether such person's remaining will serve the best interests of (a) the state, (b) the town to which the person has come and (c) such person. In making his determination, the commissioner shall consider (a) the circumstances involved in such person's coming to this state, (b) his situation now that he is here, (c) the circumstances involved if he remains, (d) whether he comes to this state able and willing to support himself or whether he came for the purpose of seeking welfare assistance and (e) whether he will need such assistance indefinitely."

The 1965 Session then amended the law, §17-2d, so as to change the phrase "one month from arrival" to "one year from arrival"; it eliminated the statutory restrictive standards for the guidance of the commissioner's administration of the act, and adopted the maximum federal residence requirement, 42 U. S. C. A. §602(b). The intent of the law was to keep those from benefits, who came into the state for the primary purpose of seeking welfare assistance and it should be so construed and interpreted. It has always been a principle of constitutional interpretation that the Courts, if at all possible, should construe a statute so as to bring it within the Constitution. *Michaelson* v. *United States*, 266 U.S. 42 (1924); *United States* v. *Delaware & Hudson Co.*, 213 U.S. 366 (1909).

The Public Welfare Committee of the 1967 Legislature, just adjourned, considered this residence issue in Substitute for Senate Bill No. 166; the bill was defeated by recommitment to committee.

The legislature so exercised its sovereign police powers

to classify equally all non-residents who came into Connecticut, who applied for welfare aid within a stated time period. The law affected all persons similarly situated in the class described:

> "Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment." *Barbier v. Connolly*, 113 U.S. 27, 32 (1885).

Without such a statutory deterrent, this state would be powerless to prevent its become a refuge for welfare recipients of other states; even those who might be encouraged or even assisted to migrate from their settlement of origin.

> "Freedom of residence is restricted as to citizens only while on relief. . . . No interference is had with the right of any citizen to choose and establish a home. What is controlled is the unrestricted imposition of indigent persons and families without settlement upon a community and state where they cannot establish a home because of heir indigent status. . . . Such conditions restrict individual rights and freedom in the interest of the right, security and freedom of the rest of the community of the state." *Matter of Chirillo*, 283 N.Y. 417, 28 N.E. 2d 895 (dissenting opinion).

I further dissent from the award of money damages to the plaintiff by the majority for the past aid alleged to have been unconstitutionally withheld. Connecticut has not consented to be sued for money damages in this class of action. *Monaco v. Mississippi*, 292 U.S. 313, 324 (1933); *Ex Parte State of New York No. 1*, 256 U.S. 490, 497 (1920).

Welfare aid, by its nature, does not create a vested right to back payments which have been denied. Public welfare is

a current subsistence grant from public charity funds administered by statutory standards. This is confirmed by the philosophy behind the state welfare laws requiring reimbursement from paupers for support payments. §§17-277, 17-298. This plaintiff has been living on monthly allotments from a private source, the Catholic Family Services of Hartford. A money judgment award, under the circumstances, would amount to a gratuitous windfall.

Without such a right to reimbursement for past allotments, the case is now moot. The plaintiff moved to Hartford, Connecticut in mid-June, 1966. Her present residence eligibility under §17-2d, having been satisfied, she now qualifies to apply for Aid to Dependent Children under Chapter 301. The case should accordingly be dismissed. *Doremus* v. *Board of Education*, 342 U.S. 429 (1952).

T. EMMET CLARIE
District Judge

JUDGMENT

United States District Court

District of Connecticut

Civil Action, File Number 11,821

VIVIAN MARIE THOMPSON
v.
BERNARD SHAPIRO, Commisioner Of Welfare of The State of Connecticut

Judgment

This action came on for hearing before a specially convened three judge panel of the Court consisting of the Honorable J. Joseph Smith, Circuit Judge presiding, and the

Honorable M. Joseph Blumenfeld and the Honorable T. Emmet Clarie, District Judges, and, the issues having been duly heard and a decision having been duly rendered,

It is Ordered and Adjudged:

That Chapter 299, Section 17-2d of the Connecticut General Statutes is invalid as applied to the Plaintiff:

That an injunction hereby issues permanently restraining and enjoining the Defendant and his successors, and all other persons responsible for the enforcement of the welfare law of Connecticut from the present and further enforcement of Chapter 299, Section 17-2d of the Connecticut General Statutes against the Plaintiff:

That the Defendant pay to the Plaintiff the sum of $311.91, the sum of monies unconstitutionally withheld from the Plaintiff by the Defendant, computed as follows:

Monthly Connecticut ADC Allowance for Food, Clothing and Personal Incidentals		Rent Actually Paid from Nov. 1, 1966 to June 27, 1967
Nov. (beginning Nov. 1, 1966)	$64.65	(Mother & 1 child under 2 yrs. of age)
Dec.	$64.65	(Mother & 1 child under 2 yrs. of age)
Jan.	$64.65	(Mother & 1 child under 2 yrs. of age)
Feb.	$86.65	(Mother & 2 children under 2 yrs. of age)
March	$86.65	(Mother & 2 children under 2 yrs. of age)

April	$86.65	(Mother & 2 children under 2 yrs. of age)	35 wks. @ $12.00 a wk.
May	$86.65	(Mother & 2 children under 2 yrs. of age)	
June (ending June 27, 1967)	$78.16		$420.00
	$618.71		$420.00
			618.71
			$1,038.71

Less amount paid to Plaintiff by Catholic Family Services from 1-25-67 to 6-27-67 (23 weeks at $31.60 a week) 726.80

TOTAL $ 311.91

Dated at Hartford, Connecticut, this day of , 1967.

Clerk of the Court

STIPULATION OF FACTS DATED MAY 16, 1967

United States District Court

District of Connecticut

VIVIAN MARIE THOMPSON
v.
BERNARD SHAPIRO, Commissioner Of Welfare of the State of Connecticut

May 16, 1967

Civil Action # 11,821

AGREED STIPULATION OF FACTS

1. Defendant, Bernard Shapiro, as Commissioner of Welfare, is charged with administering the Welfare Laws of the State of Connecticut.

2. Plaintiff, Vivian Marie Thompson, is a resident of Hartford, Connecticut, currently residing at 25 Florence Street, Hartford, Connecticut. She is a resident and taxpayer of the State of Connecticut.

3. The plaintiff is 19 years old,

4. The plaintiff is the unwed mother of a thirteen month old boy and a two week old girl.

5. The plaintiff's formal education ended during her junior year in Dorchester Public High School, Dorchester, Massachusetts.

6. The plaintiff and her son resided at 9 Greenwood Street, Dorchester, Massachusetts, for the eight months prior to moving to Hartford, Connecticut.

7. The plaintiff and her son received continuous ADC assistance from the City of Boston during the eight months that they lived at 9 Greenwood Street.

8. The plaintiff was denied any and all assistance, financial and otherwise, by her relatives in the Boston, Massachusetts area.

9. The plaintiff has no knowledge of her natural father's whereabouts.

10. The plaintiff's mother is Mrs. Bessie Harper of 1215 Main Street, Hartford, Connecticut.

11. The plaintiff's mother has continuously resided and worked in Hartford, Connecticut, for approximately eight years.

12. During the past eight years, the plaintiff's mother provided the plaintiff and her son with periodic financial assistance.

13. During the past eight years, the plaintiff's mother regularly visited and wrote to the plaintiff at her home in Massachusetts.

14. Plaintiff and her son moved directly to Hartford, Connecticut from Dorchester, Massachusetts in June, 1966.

15. The plaintiff and her son moved to Hartford, Connecticut to be near the plaintiff's mother, Mrs. Bessie Harper.

16. Plaintiff was encouraged, by her mother, to take up residence in Hartford, Connecticut.

17. The plaintiff's mother assured her that she would assist her and her son financially, to whatever extent possible.

18. Upon arriving in Hartford, Connecticut, the plaintiff and her son immediately moved in with the plaintiff's mother at the latter's residence at 1215 Main Street.

19. The plaintiff and her son resided with her mother at 1215 Main Street until on or about August 26, 1966, when they moved to 25 Florence Street, Hartford, Connecticut.

20. The plaintiff's mother contributed support in the form of housing and food to the plaintiff and her son during the time that they resided with her.

21. The only other source of support available to the plaintiff and her son during the period of time that they resided with the plaintiff's mother were the remaining public assistance benefits which the plaintiff received from Boston, Massachusetts.

22. The plaintiff and her son were forced to move to their own quarters at 25 Florence Street because it became financially impossible for her mother to continue to assist her and her son on the latter's income.

23. At the time that her mother advised her that she would have to move to her own residence, the plaintiff's only intention was to find suitable quarters elsewhere in Hartford.

24. At the time that she moved from 1215 Main Street the plaintiff did not attempt to return to Massachusetts.

25. The plaintiff was five months pregnant when she stopped receiving financial assistance from her mother.

26. When she took up residence at 25 Florence Street, the plaintiff was solely responsible for the daily care of her son, and was without sufficient funds to hire a baby-sitter.

27. Because of her pregnancy and her responsibilities to her son, the plaintiff was unable to either seek gainful employment or enroll in a Work Training Program under the Manpower Development Training Act administered by the State Welfare Department, at the time that she moved to 25 Florence Street, Hartford.

28. On September 7, 1966, plaintiff being solely responsible for the support of herself and her son and being without any means to accomplish such support, filed an application with the Hartford Department of Public Welfare requesting public assistance from said agency.

29. On September 7, 1966, the Hartford Department of Public Welfare advised the plaintiff that any assistance which she would receive from that agency would be temporary and that she would have to apply to the Connecticut Welfare Department for Aid to Families with Dependent Children, if she wished to receive public assistance on a continuing basis.

30. On September 7, 1966, the plaintiff was also advised by the Hartford Department of Public Welfare that she would probably not qualify for public assistance from the Connecticut Welfare Department because of the Connecticut

Residence Statute applicable to applicants for Aid to Families with Dependent Children.

31. On September 7, 1966, the plaintiff declined to accept assistance from the Hartford Department of Public Welfare for the purpose of returning to Massachusetts for the reason that she desired to continue residing in Hartford.

32. On September 8, 1966, plaintiff's application for public assistance for herself and her son was approved by the Hartford Department of Public Welfare, and the plaintiff received her initial assistance check from said agency.

33. On September 7, the plaintiff filed her first application with the Connecticut Welfare Department requesting categorical public assistance under the Aid to Families with Dependent Children Program.

34. Plaintiff's application of September 7, 1966, for Aid to Families with Dependent Children, was never processed by the Connecticut Welfare Department because the appointment wasn't kept.

35. On October 3, 1966, plaintiff reapplied to the Connecticut Welfare Department for categorical public assistance under the Aid to Families with Dependent Children Program.

36. Plaintiff's application of October 3, 1966 was denied on November 1, 1966 because the plaintiff failed to meet the residence requirement set forth in Sec. 17-2d of the Connecticut Gen. Stats. "which is applicable to all ADC recipients."

37. The plaintiff qualified for Aid to Families with Dependent Children from the Connecticut Welfare Department in all other respects.

38. Within the time prescribed by statute, the plaintiff

filed her application with the Connecticut Welfare Department requesting that a Fair Hearing be held to review the decision denying her application for categorical public assistance.

39. On December 16, 1966, a Fair Hearing was held by the Connecticut Welfare Department.

40. The plaintiff personally appeared at said Fair Hearing, represented by counsel.

41. At said Fair Hearing, plaintiff admitted that she did not meet the applicable residence statute, but maintained that it was unlawful to deny her application on that basis because said Statute contravenes the United States Constitution.

42. On January 3, 1967, the Connecticut Welfare Department upheld the decision of the District Office that plaintiff does not qualify for Aid to Families with Dependent Children because she fails to satisfy the standards of the applicable residence statute.

43. Upon being notified that she did not qualify for Aid to Families with Dependent Children from the Connecticut Welfare Department, the plaintiff decided to initiate this present action.

44. At the plaintiff's request, the Hartford Department of Public Welfare agreed to assist her in locating a charitable organization in Hartford to support her and her family pending a final judicial determination of her case.

45. Catholic Family Services of Hartford agreed to support the plaintiff and her family and as of January 25, 1967, began making weekly payments to the plaintiff in the amount of $31.60.

46. The plaintiff will receive assistance from Catholic

Family Services of Hartford only until a final determination is reached in this action.

47. The plaintiff desires to remain in Hartford so that she can continue to be near her mother.

48. The plaintiff, as a Connecticut resident, desires to have the same educational and job training opportunities that are made available to other Connecticut residents who are provided with public assistance by the Connecticut Welfare Department.

49. The plaintiff is still without the benefit of financial assistance from legally responsible relatives.

50. In the absence of receiving public assistance from the Connecticut Welfare Department, the plaintiff will be unable to support herself and her family when she stops receiving assistance from Catholic Family Services of Hartford.

51. Because of the manner in which the Aid to Families with Dependent Children Program is currently administered by the Connecticut Welfare Department, the abrupt elimination of Sec. 17-2d of the Connecticut General Statutes from the law, would cause no immediate or long term disruption in the administration of said program.

52. Connecticut has no residency requirements for any public assistance program except Aid to Dependent Children.

53. Connecticut will give Aid to Dependent Children to persons entering Connecticut without visible means of support for sixty days if they indicate a willingness to sign up for Title 5 Job Training under the Economic Opportunity Act.

54. From April 1, 1965, when the Title Five program became active in Connecticut, to December 31, 1966, three thousand one hundred thirty welfare cases were trained.

55. Connecticut contributes 54% of the costs of Aid to Dependent Children while the Federal Government contributes 46%.

56. Connecticut contributes half the cost of Aid to Dependent Children to Town Aid Programs of which 46% is contributed by the Federal Government and 54% by the state and the other half is contributed by the towns themselves.

57. The average cost per individual case on ADC in Connecticut averages $48.40 per month.

58. The maximum federal contribution in any state in the United States on ADC is $22.00 a month.

59. The federal matching formula is: 5/6ths of the first $18.00 of the maintenance award or $15.00 per month; 50% of the next $14.00 of maintenance award or $7.00 per month for a total of $22.00.

60. The average yearly per person case load on ADC from 1960 to 1966 in the State of Connecticut was as follows: 1960 26,076; 1961 29,955; 1962 33,660; 1963 37,208; 1964 43,281; 1965 47,032; 1966 48,485.

61. In 1965 there were 40 states in the United States that had residency requirements for Aid to Dependent Children.

THE PLAINTIFF

By /s/ BRIAN L. HOLLANDER
Brian L. Hollander

THE DEFENDANT

By /s/ FRANCIS J. MACGREGOR
Francis J. MacGregor

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1134

WALTER E. WASHINGTON, ET AL., APPELLANTS,

v.

MINNIE HARRELL, ET AL., APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MINNIE HARRELL, individually, on behalf of her minor children, Yvonne Harrell, Virginia Harrell, and Gwendolyn Harrell, and on behalf of all other similarly situated

CLAY LEE LEGRANT, individually, and on behalf of her two minor children, Plaintiff Intervenor

v.

1. WALTER E. WASHINGTON, individually and as Commissioner of the Government of the District of Columbia
2. WINIFRED G. THOMPSON, individually and as Director of the Department of Public Welfare of the District of Columbia
3. DONALD GRAY, individually and as Chief of the Public Assistance Division, Department of Public Welfare of the District of Columbia
4. UDINE WILSON, individually, and as Chief, Intake Service Unit, Public Assistance Division, Department of Public Welfare

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CIVIL DOCKET

DATE	PROCEEDINGS
1967	
June 12	Complaint, appearance; Exhibits A(1), A(2), A (3), B and C
June 12	Motion of Pltff. For Preliminary Injunction; Affidavit.
June 12	Application of Pltff. for Convening of Three Judge District Court, P & A; Exhibit (1)

DATE	PROCEEDINGS
1967	
June 16	Opposition of defts to pltf's application for three judge court
June 19	Application of pltfs for Three-Judge-Court argued and denied. Holtzoff, J.
June 21	Order denying application of plaintiffs for convening a Three-Judge Court. (N) Holtzoff, J.
June 23	Opinion of Court 6/19/67 PP. 1-5.
July 19	Certified copy of order of USCA granting petition for writ of mandamus.
July 26	Order consolidating case with C.A. 1579-67 and C.A. 1749-67. (signed 7/20/67) (N) Hart, J.
Aug 1	Designation of Honorable David L. Bazelon, Chief Judge, U.S.C.A. and Honorable Charles Fahy, Senior Circuit Judge to serve with the Honorable Alexander Holtzoff, as members of a three judge Court. (N) Bazelon, C. J.
Aug 1	Amended complaint
Aug 2	Motion of defts to dismiss complaints or for summary judgment; exhibits A, B & C; P&A; statement
Aug 14	Opposition of pltf to defts' motion to dismiss or for summary judgment
Aug 25	Counter-motion of pltfs for summary judgment
Aug 21	Order permitting Clay Lee Legrant, individually and on behalf of her two minor children, to intervene without prepayment of costs or fees or to give security therefor. (N) Holtzoff, J.
Sep 1	Corrected copy of Oral Opinion of the Court (dated June 22, 1967) Holtzoff, J.
Sep 7	Motion of pltfs for preliminary injunction and cross-motions for summary judgment argued and and taken under advisement. (Reporter—G. Nevitt) Bazelon, C.J., Fahy, J. & Holtzoff, J.

DATE	PROCEEDINGS
1967	
Sep 11	Findings of Fact and Conclusions of Law granting preliminary injunction (N) Bazelon, C. J. and Fahy, J.
Sep 11	Order enjoining pendnete lite or until further order of the Court defts from denying public assistance to pltfs. Bazelon, C.J. & Fahy, J., Dissent (N) Holtzoff, J.
Sep 15	Complaint of intervenor-plaintiff Clay Lee Legrant. Exh. filed
Oct 16	Order permitting actions to be maintained as class actions. Holtzoff, J.
Nov 8	Opinion finding one-year residence requirements of Section 3-203 (a) (b) of the Code are invalid in application to pltfs and those in like circumstances. (Judgment to be presented) (N) Bazelon, C. J. Fahy, Dissent: Holtzoff, J.
Nov 28	Order permanently enjoining defendants from enforcing or giving any legal effect to the provisions of Sections 3-203 (a) and (b), D.C. Code (1967 ed); from enforcing or giving any legal effect to such provisions of EL 9.I of the District of Columbia Department of Public Welfare Handbook of Public Assistance and from refusing to process any application for aid to Families with Dependent Children, etc., (See order for Details) Bazelon, C.J., Fahy, J., and Holtzoff, J.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1497-67

MINNIE HARRELL

vs.

WALTER E. WASHINGTON, ET AL.

AMENDED COMPLAINT

(for declaratory judgment and injunctive relief)

1. This is an action for a declaratory judgment to declare that enforcement of a requirement of residency within the District of Columbia for one year prior to application as a precondition to eligibility for public assistance deprives plaintiffs, and the class they represent, of rights to due process and equal protection of the law secured by the Fifth Amendment to the Constitution of the United States and further constitutes an unconstitutional infringement of the plaintiffs' right to free association guaranteed by the First Amendment to the Constitution, or in the alternative to declare that each and every defendant has incorrectly interpreted the law of the District of Columbia by promulgating and enforcing regulations which result in the denial of public assistance to the plaintiffs, and all others similarly situated, on the ground that plaintiff and her minor children are ineligible for public assistance in the District of Columbia because they have not lived in the District of Columbia one year prior to application for assistance.

2. This action also seeks a preliminary injunction and a permanent injunction restraining each and every defendant from refusing public assistance to plaintiffs, and the class they represent, on the ground that the plaintiff

and her minor children are ineligible for public assistance because they do not satisfy requirements of one-year residency, and to require consideration of the application of plaintiffs for assistance without regard to such requirement of one-year residency; and to enjoin further the enforcement of the one year requirement of residency against plaintiffs and all others similarly situated, as a prerequisite to eligibility for public assistance, as constituting a deprivation of rights to due process and equal protection secured by the Fifth Amendment to the Constitution of the United States and an inhibition to rights of free association guaranteed by the First Amendment to the Constitution.

3. Jurisdiction is conferred on this Court by Title 11, Section 521 of District of Columbia Code; by Title 28, 1343 of the United States Code providing for original jurisdiction of this Court in suits authorized by Title 42, Section 1983 of the United States Code; by Title 28, Section 2201 relating to declaratory judgments; and by Title 28, Sections 2282 and 2284 of the United States Code providing for a three-judge District Court wherever an application is made for an injunction restraining the enforcement, operation, or execution of any Act of Congress for repugnance to the Constitution of the United States.

4. Plaintiff Minnie Harrell is an adult citizen of the United States and has resided continuously within the District of Columbia since September 3, 1966. She is the mother of the plaintiff children: Yvonne Harrell, age 9; Virginia Harrell, age 7; and Gwendolyn Harrell, age 2. All of these children have resided with their mother in the District since September 3, 1966, when they arrived here with their mother from New York.

5. Plaintiffs are members of a class composed of District of Columbia resident mothers and needy children who have been denied public assistance of any kind by the Department of Public Welfare of the District of Columbia on the ground that they have not lived in the District of Columbia for one year prior to application for assistance. Plaintiff, Minnie Harrell, is a member of a class composed of needy resident individuals who have been denied assistance for failure to satisfy the durational resi-

dency requirement because during their first year in the District they became public charges or wards in public institutions, and time spent in such institution could not count toward establishing residency. Plaintiffs bring this action pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of themselves and all persons constituting the above class who are similarly situated. The persons in the class are so numerous that joinder of all members is impractical; there are questions of law or fact common to the class; the claims of the representative parties are typical of the claims of the class; and the representative parties will fairly and adequately protect the interests of the class.

6. Defendants: (a) Defendant Board of Commissioners, pursuant to the provisions of D.C. Code 3-202 et. seq. (Supp. V), is responsible for administering the District of Columbia Public Assistance Act of 1962, which authorizes programs entitled Aid to Families with Dependent Children (hereinafter referred to as AFDC) and General Public Assistance (hereinafter referred to as GPA), among other programs, and establishing rules and regulations to carry out the provisions of the Act. Defendants Walter N. Tobriner, John B. Duncan and Brig. Gen. Robert E. Mathe are members of and constitute the defendant Board of Commissioners.

(b) Defendant Winifred G. Thompson is Director of the Department of Public Welfare of the District of Columbia, a governmental agency of the District of Columbia, which has responsibility for the administration of AFDC, GPA, and other public assistance programs and whose agents have enforced the policies and practices herein complained of. The Director of the Department of Public Welfare performs all the functions vested in the Board of Commissioners by the District of Columbia Public Assistance Act of 1962, except the adoption and promulgation of regulations (D.C. Code § 3-220 (Supp. V); D.C. Code, Title I, Appendix, Reorg. Ord. No. 140 (Supp. V)).

(c) Defendant Donald Gray is Chief of the public Assistance Division of the Department of Public Welfare, which Division has been delegated responsibility for the

supervision of public assistance programs, including GPA and AFDC.

(d) Defendant John White is Chief of Intake of the Public Assistance Division of the Department of Public Welfare. It is his delegated duty to evaluate the eligibility of applicants for public assistance according to the regulations of the Department of Public Welfare.

7. Plaintiff Minnie Harrell came to the District of Columbia with her three children from New York on September 3, 1966. She and her children have lived here continuously since that date. She had been receiving public assistance (AFDC) in the State of New York since separation from her husband in April, 1966. Having become seriously ill with cancer and separated from her husband, Mrs. Harrell came to the District of Columbia, where her brother and sister reside, so that during her illness she could be with her relatives who could care for her children if she had to be hospitalized. Plaintiff intends to remain permanently in the District of Columbia.

8. Continuing in ill health and being unable because of her health to obtain anything other than occasional employment as a domestic on a day basis, plaintiff went to the District of Columbia Department of Public Welfare on December 13, 1966 and asked that Department to find out if she might be able to continue receiving assistance from the State of New York despite her current residence in the District of Columbia. The Department of Public Welfare for the District of Columbia inquired of the Department of Public Welfare of Suffolk County, New York whether assistance payments could be transmitted to the District of Columbia on behalf of the plaintiff's three minor children until such time as they had lived one continuous year in the District of Columbia. Other requests were made to the New York welfare authorities by caseworkers for the Travelers Aid Society of the District of Columbia and by Mrs. Grace E. Payne, Clinical Social Worker, Freedmen's Hospital, District of Columbia. New York has determined that plaintiff and her children are ineligible for further assistance. Plaintiff has received no public assistance payment from New York since leaving that jurisdiction. A copy of a letter dated April 20, 1967 from Mrs. Jane F. Berry, Supervisor, Department of Pub-

lic Welfare, District of Columbia to an attorney for the plaintiff, setting forth plaintiff's contacts with that Department; a copy of a letter dated March 13, 1967 from Mrs. Grace E. Payne, Clinical Social Worker, Freedmen's Hospital, Washington, D.C. to Mrs. D.W. Lindsey, Caseworker, Department of Public Welfare, 75 4th Avenue, Bay Shore, New York (confidential medical information blocked out), setting forth another attempt to obtain aid from the State of New York; and a copy of a letter dated June 2, 1967 from Mrs. Ruth Rosenhouse, Travelers Aid Society of Washington, D.C., to an attorney for the plaintiff, setting forth the attempts of that society to help plaintiff get assistance, are attached hereto as Exhibit A and are hereby incorporated by reference in this Complaint.

9. Plaintiff had been informally advised by the Department of Public Welfare of the District of Columbia at her first visit to the Department on December 13, 1966 that she and her children would not be eligible for assistance from the District of Columbia until such time as her children had lived in the District of Columbia for one continuous year. On May 12, 1967, Mrs. Harrell formally applied for public assistance on behalf of her three minor children; and on that date the application was rejected in writing by defendant Donald Gray on the ground that plaintiff's three minor children had not lived in the District of Columbia for one year prior to the date of application for public assistance, as required under the Agency's interpretation of D.C. Code 3-203. A copy of the Notice of ineligibility dated May 12, 1967 is attached hereto as Exhibit B and is hereby incorporated by reference in this Complaint.

10. While plaintiff children will be eligible for assistance on September 3, 1966, plaintiff mother, pursuant to District of Columbia Department of Public Welfare Handbook of Public Assistance Policies and Procedures, EL 9.1, III, B,3, will not be eligible for assistance until after November 3, 1967, since during her first year in the District plaintiff mother was hospitalized for surgery at Freedmen's Hospital from February 14, 1967, until April 13, 1967. Time spent in a public hospital as a public

charge does not count toward meeting the one year durational residency requirement (EL 9.1, III, B,2a).

11. The regulations adopted and enforced by the defendants, providing that time spent in an institution as a public charge during the first year an individual lives in the District of Columbia does not count toward establishing D.C. residence for welfare eligibility purposes (District of Columbia Department of Public Welfare, Handbook of Public Assistance Policies and Procedures, EL 9.1, III, B,3) and that a patient or inmate of any public institution, such as a hospital, sanitarium, asylum, jail or penitentiary, or whose care is paid from Government funds in a private institution cannot gain residence while so institutionalized (District of Columbia Handbook of Public Assistance Policies and Procedures, EL 9.1 III, B,2a) are contrary to the laws of the District of Columbia and of the United States, in that they are contrary to D.C. Code 3-202 (b)(1) and 42 U.S.C. 601, as applied to plaintiff mother and the class she represents.

12. The regulations adopted and enforced by the defendants, providing that time spent in an institution as a public charge during the first year an individual lives in the District of Columbia does not count toward establishing D.C. residence for welfare eligibility purposes (District of Columbia Department of Public Welfare Handbook of Public Assistance Policies and Procedures, EL 9.1, III, B,3) and that a patient or inmate of any public institution cannot gain residence while so institutionalized (District of Columbia Handbook of Public Assistance Policies and Procedures, EL 9.1, III, B,2a) deprive plaintiff and the class she represents of rights to due process and equal protection of the law secured by the Fifth Amendment to the Constitution of the United States, in that aforesaid regulations, read together, create an unreasonable, arbitrary, and discriminatory classification among individuals residing in the District of Columbia who are denied aid solely because, without fault on their part, they became public charges during their first year in the District,

13. The regulations enforced by the defendants, providing for denial of assistance to the plaintiff's three min-

or children, and all others similarly situated, because they have not resided in the District of Columbia for one continuous year prior to application (District of Columbia, Handbook of Public Assistance Policies and Procedures, EL 9.1, I and III) are contrary to District of Columbia Code 3-203, which provides in subsections (a) and (c), read together, that assistance may be awarded to applicants such as the plaintiff's three minor children. Defendants have persisted in denying assistance to any applicant for assistance who has not lived in the District of Columbia for one continuous year prior to application because they have erroneously construed District of Columbia Code 3-203 to forbid the authorization of assistance to any applicant who does not fulfill the one year residency requirement.

14. Defendant's refusal to consider further plaintiff's application for public assistance on behalf of her three minor children and all others similarly situated, because they have not resided in the District of Columbia for one continuous year prior to application is contrary to the Constitution of the United States, to wit:

(a) The one year residence requirement allegedly set forth by District of Columbia Code 3-203, and in the regulations implementing said section (District of Columbia, Handbook of Public Assistance Policies and Procedures, EL 9.1), creates an unreasonable, arbitrary, and discriminatory classification among needy children who are residents of the District of Columbia in violation of due process and the equal protection of the laws under the Fifth Amendment to the Constitution of the United States, in that plaintiff's children and all those similarly situated are denied aid solely because they were born in another jurisdiction and have not lived here one year without regard to the purposes of public assistance set forth in D.C. Code, 202 (b) (1) and the purposes of AFDC set forth in 42 U.S.C. 601. Said regulations implementing Section 203 of Title 3 are attached hereto as Exhibit C and are hereby incorporated by reference in this complaint.

(b) The enforcement of any residency requirement as a prerequisite for eligibility for public assistance is an

abridgement of the rights of plaintiffs, and all others similarly situated, as citizens of the United States, to move freely from state to state, to settle freely and without hinderance in the state of their choice, and to associate freely with relatives and friends, in violation of due process of law under the Fifth Amendment to the Constitution of the United States and in violation of freedom of association protected under the First Amendment to the Constitution.

15. Plaintiff alleges on information and belief that she and her children are eligible for public assistance on all other grounds of eligibility other than one year continuous residency in the District of Columbia.

16. Plaintiff, and all others similarly situated, on whose behalf this suit is brought, are suffering irreparable injury and are threatened with irreparable injury in the future by reason of the acts of defendants hereinbefore set forth. Due to refusal of defendants to further consider her application for public assistance on behalf of her three minor children despite their eligibility for assistance on all grounds other than one year residency, the three minor children of plaintiff have no dependable source of support. Having undergone prolonged hospitalization for major surgery for cancer, plaintiff and her three children are now and have been living with her brother, his wife, and their six children in a crowded four bedroom unit of the National Capital Housing Authority at 323 51st Street, N.E., Washington, D.C. Plaintiff is medically unable to work, and her relatives are financially unable to support her and her three children. Plaintiff and her three children have no other source of support, since the husband of the plaintiff, though under court order in New York to support, has not sent money since December, 1966. In order to keep the family together and prevent commitment of plaintiff's three minor children to Junior Village of the District of Columbia, an institution for dependent children, Family and Child Services of the District of Columbia has provided money for the purchase of food stamps for plaintiff's three minor children during April and May, 1967. The denial of public assistance benefits may result in the necessity of institutionalizing the children, thereby caus-

ing irreparable injury to the family life, well being, and physical and psychological health of plaintiff's children.

17. Unless enjoined by the Court, defendants will continue to refuse assistance to the plaintiffs, and all other similarly situated, for public assistance on the ground that they have not lived here for one continuous year prior to application.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully pray on behalf of themselves and those similarly situated:

1. That a three-judge court be convened to determine this controversy pursuant to Title 28, Section 2284, of the United States Code.

2. That this court enter a declaratory judgment pursuant to 28 U.S.C. 2201 declaring that District of Columbia, Department of Public Welfare, Handbook of Public Assistance Policies and Procedures, EL 9.1, III, B, 2a and EL 9.1, III, B,3, as applied to plaintiff, and the class she represents, are contrary to D.C. Code 3-202 (b) (1) and to 42 U.S.C. 601 and further declaring that aforesaid regulations are repugnant to the Fifth Amendment to the Constitution of the United States, and that the defendants, and each of them, are required by the Constitution of the United States to consider the application of the plaintiff, and all others similarly situated, for public assistance without reference to such regulations.

3. That this Court enter a declaratory judgment pursuant to 28 U.S.C. 2201 declaring that District of Columbia Code 3-203 makes it discretionary with the Commissioners of the District of Columbia and the District of Columbia Public Welfare Department to award assistance to resident applicants who have not lived in the District of Columbia for one year and who are within the categories of assistance set forth in District of Columbia Code 3-202, that the Court declare the defendants' regulations implementing D.C. Code Section 3-203 void and unenforceable as erroneous interpretations of D.C. Code Section 3-203, and that this Court retain jurisdiction over this case with the purpose of future determination of the

constitutional issues raised herein if the defendants fail to further consider the applications of plaintiffs and all others similarly situated without regard to duration of residence in the District of Columbia.

4. That if this Court finds that District of Columbia Code 3-203 does in fact impose a mandatory requirement of one year residence in the District of Columbia before eligibility for public assistance can be established, that this Court enter a declaratory judgment pursuant to Title 28, Section 2201, declaring that District of Columbia Code 3-203, and the regulations implementing that requirement, as contained in EL 9.1 of the Handbook of Public Assistance Policies and Procedures, are repugnant to the Constitution of the United States, and that the defendants, and each of them, are required by the Constitution of the United States to consider the application of plaintiffs, and all others similarly situated, for public assistance without reference to such statute.

5. That this Court enter a preliminary and permanent injunction restraining each defendant, their successors in office, agents, and employees from enforcing District of Columbia Code 3-203 or the regulations implementing that section, including EL 9.1, III, B, 2a and EL 9.1, III, B,3 and ordering them to further consider the application for public assistance of plaintiff and her three children and all others similarly situated on the basis that the statute, in imposing a requirement of one year residency in the District of Columbia as a prerequisite for eligibility for public assistance is violative of the rights of the plaintiffs under the First and Fifth Amendments to the Constitution of the United States, or that the regulations providing that durational residency for public assistance purposes cannot be satisfied if an individual becomes a public charge during his first year in the District and remains a public charge are violative of the rights of the plaintiff under the Fifth Amendment to the Constitution.

6. That this Court order defendants, Winifred Thompson and Donald Gray, if upon further processing of the application of plaintiff and her named minor children, the Department deems them to be eligible for public assistance, to establish plaintiff's and her children's eligibility

retroactively to the date of the first application for public assistance by the plaintiff on behalf of the named minor children and to disburse benefits retroactive to such date whereon plaintiff and her children would have become eligible for AFDC without regard to D.C. Code 3-203 or EL 9.1, III, B, 2a and EL 9.1, III, B,3.

7. That this Court allow plaintiffs their costs herein, and grant them and all others similarly situated such further, other, additional, or alternative relief as may appear to the Court to be just and appropriate.

[Certificate of Service Omitted in Printing]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

VERA M. BARLEY, Individually and on behalf of all others similarly situated

v.

1. WALTER E. WASHINGTON, individually and as Commissioner of the Government of the District of Columbia
2. WINIFRED G. THOMPSON, individually and as Director of the Department of Public Welfare of the District of Columbia
3. DONALD GRAY, individually and as Chief of the Public Assistance Division, Department of Public Welfare of the District of Columbia
4. UDINE WILSON, individually and as Chief, Intake Service Unit, Public Assistance Division, Department of Public Welfare
6. VIVIAN JODON, INDIVIDUALLY and as Acting Chief, Intake Service Unit Public Assistance Division, Department of Public Welfare for the District of Columbia

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June 20	Complaint, appearance Exhibits A, B & C.
June 20	Motion for Preliminary Injunction, Appendix A, Affidavit, Memorandum.
June 20	Application for convening of Three Judge District Court, P&A, Appendix I.

DATE	PROCEEDINGS
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Jun 28	Opposition of defendants to application of plaintiff for Three-Judge Court
Jun 29	Exhibit D of plaintiff. filed
Jul 6	Exhibit E of plaintiff
Jul 7	Application for convening Three Judge Court argued and stayed until U.S. Court of Appeals disposes of request for mandamus.
Jul 12	Order staying proceedings until the United States Court of Appeals rules in the mandamus proceeding of Harrell, et al v. the Honorable Alexander Holtzoff. (N) Walsh, J.
Aug 1	Designation of Honorable David L. Bazelon, Chief Judge, U.S.C.A. and Honorable Charles Fahy, Senior Circuit Judge to serve with the Honorable Alexander Holtzoff, United States District Judge as members of a three judge court. (Original filed in C.A. 1497-67) Bazelon, C.J.
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1579-67

VERA M. BARLEY

vs.

WALTER E. WASHINGTON, ET AL.

COMPLAINT

(for declaratory judgment and injunctive relief)

1. This is an action for a declaratory judgment to declare that regulations adopted and enforced by the defendants which prevent plaintiff and all others similarly situated from satisfying the durational residency requirement for public assistance eligibility solely because they became public charges during their first year of residency in the District and subsequently remained public charges deprive plaintiff and all others similarly situated of rights to due process and equal protection of the law secured by the Fifth Amendment to the Constitution of the United States and that said regulations are contrary to the law of the District of Columbia and of the United States; or in the alternative to declare that each and every defendant has incorrectly interpreted the law of the District of Columbia by promulgating and enforcing regulations which result in the denial of public assistance to the needy plaintiff, and all others similarly situated, solely because they have not met the one year durational residency requirement; and that this Court declare that enforcement of a requirement of residency within the District of Columbia for one year prior to application as a precondition to eligibility for public assistance deprives plaintiff and the class she represents of rights to due process and equal protection of the law secured by the Fifth Amendment

to the Constitution of the United States and further constitutes an unconstitutional infringement of the plaintiff's right to free association guaranteed by the First Amendment to the Constitution.

2. This action also seeks a preliminary injunction and a permanent injunction restraining each and every defendant from refusing public assistance to plaintiff, and the class she represents, on the ground that the plaintiff is ineligible for public assistance because she does not satisfy requirements of one-year residency, and to require consideration of the application of plaintiff for assistance without regard to such requirement of one-year residency or without regard to the regulations preventing plaintiff from meeting the durational residency requirement solely because of her commitment to St. Elizabeth's Hospital during her first year in the District, and to enjoin the enforcement of the regulations preventing plaintiff, and the class she represents, from satisfying the durational residency requirement, as constituting a deprivation of rights to due process and equal protection secured by the Fifth Amendment of the Constitution of the United States, and as being contrary to the law of the District of Columbia and of the United States; and to enjoin further the enforcement of the one year requirement of residency against plaintiff and all others similarly situated, as a prerequisite to eligibility for public assistance, as constituting a deprivation of rights to due process and equal protection secured by the Fifth Amendment to the Constitution of the United States and an inhibition to rights of free association guaranteed by the First Amendment to the Constitution.

3. Jurisdiction is conferred on this Court by Title 11, Section 521 of District of Columbia Code; by Title 28, 1343 of the United States Code providing for original jurisdiction of this Court in suits authorized by Title 42, Section 1983 of the United States Code; by Title 28, Section 2201 relating to declaratory judgments; and by Title 28, Sections 2282 and 2284 of the United States Code providing for a three-judge District Court wherever an application is made for an injunction restraining the enforcement, operation, or execution of any Act of Congress for repugnance to the Constitution of the Uinted States.

4. Plaintiff, Vera M. Barley, is an adult citizen of the United States and has resided continuously in St. Elizabeth's Hospital, District of Columbia, since her commitment to that institution on April 1, 1941 by the District Court for the District of Columbia. Plaintiff has been deemed competent since September 15, 1965, pursuant to D.C. Code 21-564.

5. Plaintiff is a member of a class composed of needy inmates of St. Elizabeth's Hospital who, like plaintiff, are ready for release into a foster care home in the community but who cannot be released because said inmates have no source of support available to sustain them except for public assistance grants to the partially or totally disabled or grants under General Public Assistance, for which they are not eligible because, pursuant to regulations promulgated and enforced by the defendants, they have not met the one year durational residency requirement for eligibility for public assistance regardless of the length of their stay in the hospital. Plaintiff is also a member of a larger class of needy resident individuals of the District of Columbia, including needy mothers and their children, who have been denied public assistance of any kind by the Department of Public Welfare of the District of Columbia on the ground that they have not satisfied the one year durational residency requirement imposed by the defendants as a precondition for receiving public assistance. Plaintiff brings this action pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of herself and all persons constituting the above class who are similarly situated. The persons in the class are so numerous that joinder of all members is impractical; there are questions of law or fact common to the class; the claims of the representative parties are typical of the claims of the class; and the representative parties will fairly and adequately protect the interests of the class.

6. Defendants: (a) Defendant Board of Commissioners, pursuant to the provisions of D.C. Code 3-202 et seq. (Supp. V), is responsible for administering the District of Columbia Public Assistance Act of 1962, which authorizes programs entitled Aid to the Partially or Totally Disabled (hereinafter referred to as APTD) and General Public

Assistance (hereinafter referred to as GPA), among other programs, and establishing rules and regulations to carry out the provisions of the Act. Defendants Walter N. Tobriner, John B. Duncan and Brig. Gen. Robert E. Mathe are members of and constitute the defendant Board of Commissioners.

(b) Defendant Winifred G. Thompson is Director of the Department of Public Welfare of the District of Columbia, a governmental agency of the District of Columbia which has responsibility for the administration of APTD, GPA, and other public assistance programs and whose agents have enforced the policies and practices herein complained of. The Director of the Department of Public Welfare performs all the functions vested in the Board of Commissioners by the District of Columbia Public Assistance Act of 1962, except the adoption and promulgation of regulations (D.C. Code § 3-220 (Supp. V); D.C. Code, Title I, Appendix, Reorg. Ord. No. 140 (Supp. V)).

(c) Defendant Donald Gray is Chief of the Public Assistance Division of the Department of Public Welfare, which Division has been delegated responsibility for the supervision of public assistance programs, including GPA and APTD.

(d) Defendant Vivian Jodan is Acting Chief of Intake Service Unit of the Public Assistance Division of the Department of Public Welfare. It is her delegated duty to evaluate the eligibility of applicants for public assistance according to the regulations of the Department of Public Welfare.

7. Plaintiff, Vera Barley, was born in 1901 in San Francisco, California. She, her husband, and two sons moved to Washington, D.C. in January of 1935, where they resided for one and one-half years. Plaintiff did not return to the District of Columbia until March, 1941, at which time she was and had been suffering from mental illness. Plaintiff was committed to St. Elizabeth's Hospital by court order on April 1, 1941, where she has remained to date. If released, plaintiff, who has been deemed competent since September 15, 1965 under D.C. Code 21-564, intends to live in the District of Columbia in a foster care home, as advised by her doctors. Plaintiff has no ties with any other jurisdiction and feels there is no other place

except the District of Columbia in which she wishes to live. Plaintiff's hospitalization has been and is being paid for by the District of Columbia at the rate of $414.90 per month. If she were permitted to live in a foster care setting outside the hospital, plaintiff would receive approximately $114 per month from the District of Columbia. During the 26 years she has been in the hospital, the District of Columbia has not been able to find any other jurisdiction which regards itself as legally obligated to care for her or which would accept her (D.C. Code 21-551).

8. Plaintiff was referred on Januay 19, 1967 to the Department of Public Welfare by Robert Howe, Social Worker, Foster Care Unit, St. Elizabeth's Hospital, for the purpose of establishing her eligibility for public assistance. This referral was made because plaintiff was deemed competent and able to live outside the institution if the Department of Public Welfare of the District of Columbia would assist her financially so that she could be placed in a foster care home.

9. Plaintiff's application for assistance was rejected in writing by defendant Donald Gray on February 23, 1967 on the ground that plaintiff's one year residency in the District of Columbia prior to hospitalization, as required by Departmental regulations, could not be established.

10. By letter dated March 15, 1967 from Joseph F. Dugan, Esq. to defendant, Donald Gray, plaintiff requested an administrative hearing pursuant to Title 3, Section 214 of the District of Columbia Code to determine whether the action of defendant, Donald Gray, in refusing her public assistance, was correct.

11. On April 13, 1967, an administrative hearing was held, pursuant to Title 3, Section 214 of the District of Columbia Code, on the appeal filed by plaintiff requesting reversal of the agency action denying her assistance. A copy of the official Transcript of Record is annexed hereto as Exhibit *A*, and incorporated by reference into this Complaint.

12. By an opinion dated May 5, 1967, Hearing Officer Elbert D. Gadsden, sustained the Agency action referred to in the preceding paragraphs. A copy of the Hearing

Officer's Appeal Hearing, Summary of Findings, dated May 5, 1967, is attached hereto as Exhibit *B* and incorporated by reference into this Complaint.

13. By letter dated June 8, 1967, from defendant, Winifred Thompson, Director, Department of Public Welfare, plaintiff was notified that the Director had made a final administrative determination upholding the decision of the Hearing Officer affirming the Department's initial decision finding plaintiff ineligible for assistance because she was not a resident of the District of Columbia, as defined by the Department's regulations.

14. The regulations adopted and enforced by the defendants, providing that time spent in an institution as a public charge during the first year an individual lives in the District of Columbia does not count toward establishing D.C. residence for welfare eligibility purposes (District of Columbia Department of Public Welfare, Handbook of Public Assistance Policies and Procedures, EL 9.1, III, B, 3) and that a patient or inmate of any public institution, such as a hospital, sanitarium, asylum, jail or penitentiary, or whose care is paid from Government funds in a private institution cannot gain residence while so institutionalized (District of Columbia Handbook of Public Assistance Policies and Procedures, EL 9.1, III, B, 2a) are contrary to the laws of the District of Columbia and of the United States, in that they are contrary to D.C. Code 3-202 (b) (1) and 42 U.S.C. 1351, as applied to plaintiff and the class she represents.

15. The regulations adopted and enforced by the defendants, providing that time spent in an institution as a public charge during the first year an individual lives in the District of Columbia does not count toward establishing D.C. residence for welfare eligibility purposes (District of Columbia Department of Public Welfare Handbook of Public Assistance Policies and Procedures, EL 9.1, III, B, 3) and that a patient or inmate of any public institution cannot gain residence while so institutionalized (District of Columbia Handbook of Public Assistance Policies and Procedures, EL 9.1, III, B, 2a) deprive plaintiff and the class she represents of rights to due process and equal protection of the law secured by the Fifth Amendment to the Constitution of the United

States, in that aforesaid regulations, read together, create an unreasonable, arbitrary, and discriminatory classification among individuals residing in the District of Columbia who are denied aid solely because, without fault on their part, they became public charges during their first year in the District.

16. The regulations enforced by the defendants, providing for denial of assistance to the plaintiff, and all others similarly situated, because they have not resided in the District of Columbia for one continuous year prior to application (District of Columbia Handbook of Public Assistance Policies and Procedures, EL 9.1, I and III) are contrary to District of Columbia Code 3-203, which provides in subsections (a) and (c), read together, that assistance may be awarded to an applicant such as the plaintiff. Defendants have persisted in denying assistance to any applicant for assistance who has not lived in the District of Columbia for one continuous year prior to application because they have erroneously construed District of Columbia Code 3-203 to forbid the authorization of assistance to any applicant who does not fulfill the one year residency requirement.

17. Defendant's refusal to consider further plaintiff's application for public assistance because she has not resided in the District of Columbia for one continuous year prior to application is contrary to the Constitution of the United States, to wit:

(a) The one year residence requirement allegedly set forth by District of Columbia Code 3-203, and in the regulations implementing said section (District of Columbia Handbook of Public Assistance Policies and Procedures, EL 9.1), creates an unreasonable, arbitrary, and discriminatory classification among residents of the District of Columbia in violation of due process and the equal protection of the laws under the Fifth Amendment to the Constitution of the United States, in that plaintiff and all those similarly situated are denied aid solely because they have not lived here one continuous year prior to application without regard to the purposes of public assistance set forth in D.C. Code, 202 (b) (1) and 42 U.S.C. 1351. Said regulations implementing Section 203 of Title

3 are attached hereto as Exhibit C and are hereby incorporated by reference in this complaint.

(b) The enforcement of any residency requirement as a prerequisite for eligibility for public assistance is an abridgement of the rights of plaintiff, and all others similarly situated, as a citizen of the United States, to move freely from state to state, to settle freely and remain in the state of her choice, and to associate freely with relatives and friends, in violation of due process of law under the Fifth Amendment to the Constitution of the United States and in violation of freedom of association protected under the First Amendment to the Constitution.

18. Plaintiff alleges on information and belief that she is eligible for public assistance on all other grounds of eligibility other than satisfaction of the durational residency requirement imposed by defendants.

19. Plaintiff, and all others similarly situated, on whose behalf this suit is brought, are suffering irreparable injury and are threatened with irreparable injury in the future by reason of the acts of defendants hereinbefore set forth. Due to refusal of defendants to consider further her application for public assistance despite her eligibility for assistance on all grounds other than residency, plaintiff must remain an inmate at St. Elizabeth's Hospital despite agreement among her attending physicians and social workers that she is ready for release and fully competent in all areas, including voting. Plaintiff is considered well enough to live in a foster care setting, but being unable to work because of her age and long period of institutionalization, she has no source of income to sustain herself in such a setting until she would have met the eligibility requirements for public assistance. No relatives or private charity are willing or able to assume the burden of supporting plaintiff. Plaintiff is but one of a class of numerous individuals currently committed to St. Elizabeth's Hospital whose health and well-being are being irreparably damaged because they must continue to be hospitalized in the absence of any means of support in a foster care setting outside the hospital. Without public assistance, plaintiff must remain in the hospital despite the fact that she is considered legally competent in all

areas, including voting. Continued hospitalization would irreparably injure plaintiff's future in that plaintiff's long sojourn at St. Elizabeth's Hospital has acclimated her to institutional life and if a change from institutionalized status is to be made, it must be made in plaintiff's current state of readiness.

20. Unless enjoined by the Court, defendants will continue to refuse assistance to the plaintiff, and all others similarly situated, for public assistance on the ground that they have not met the durational residency requirement allegedly set forth in Title 3, Section 203 of the D.C. Code, as interpreted by EL 9.1, I and III, of the Regulations of the Department of Public Welfare, District of Columbia.

PRAYER FOR RELIEF

WHEREFORE, plaintiff respectfully prays on behalf of herself and those similarly situated:

1. That a three-judge Court be convened to determine this controversy pursuant to Title 28, Section 2284, of the United States Code.

2. That this court enter a declaratory judgment pursuant to 28 U.S.C. 2201 declaring that District of Columbia, Department of Public Welfare, Handbook of Public Assistance Policies and Procedures, EL 9.1, III, B, 2a and EL 9.1, III, B, 3, as applied to plaintiff, and the class she represents, are contrary to D.C. Code 3-202 (b) (1) and to 42 U.S.C. 1351 and further declaring that aforesaid regulations are repugnant to the Fifth Amendment to the Constitution of the United States, and that the defendants, and each of them, are required by the Constitution of the United States to consider the application of the plaintiff, and all others similarly situated, for public assistance without reference to such regulations.

3. That this Court enter a declaratory judgment pursuant to 28 U.S.C. 2201 declaring that District of Columbia Code 3-203 makes it discretionary with the Commissioners of the District of Columbia and the District of Columbia Public Welfare Department to award assistance to resident applicants who have not lived in the

District of Columbia for one year and who are within the categories of assistance set forth in District of Columbia Code, 3-202; that the Court declare the defendants' regulations implementing D.C. Code Section 3-203 void and unenforceable as erroneous interpretations of D.C. Code Section 3-203; and that this Court retain jurisdiction over this case with the purpose of future determination of the constitutional issues raised herein if the defendants fail to consider further the applications of plaintiff and all others similarly situated without regard to duration of residence in the District of Columbia.

4. That if this Court finds that District of Columbia Code 3-203 does in fact impose a mandatory requirement of one year residence in the District of Columbia before eligibility for public assistance can be established, that this Court enter a declaratory judgment pursuant to Title 28, Section 2201, declaring that District of Columbia Code 3-203, and the regulations implementing that requirement, as contained in EL 9.1, I and III of the Handbook of Public Assistance Policies and Procedures, are repugnant to the Constitution of the United States, and that the defendants, and each of them, are required by the Constitution of the United States to consider the application of plaintiff, and all others similarly situated, for public assistance without reference to such statute.

5. That this Court enter a preliminary and permanent injunction restraining each defendant, their successors in office, agents, and employees from enforcing District of Columbia Code 3-203 or the regulations implementing that section, including EL 9.1, III, B, 2a and EL 9.1, III, B, 3, and ordering them to further consider the applications for public assistance of plaintiff, and all others similarly situated, on the basis that the statute, in imposing a requirement of one year residency in the District of Columbia as a prerequisite for eligibility for public assistance is violative of the rights of the plaintiff under the First and Fifth Amendments to the Constitution of the United States, or that the regulations providing that durational residency for public assistance purposes cannot be satisfied if an individual becomes a public charge during his first year in the District and re-

mains a public charge are violative of the rights of the plaintiff under the Fifth Amendment to the Constitution.

6. That this Court allow plaintiff her costs herein, and grant her and all others similarly situated such further, other, additional, or alternative relief as may appear to the Court to be just and appropriate.

* * * * *

[Jurat Omitted in Printing]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GLORIA JEAN BROWN, on behalf of her minor children, Cassondra Brown, Felicia Brown, and Shawn Brown

CLAY LEE LEGRANT, individually and on behalf of her two minor children, Plaintiff Intervenor

v.

1. WALTER E. WASHINGTON, individually and as Commissioner of the Government of the District of Columbia
2. WINIFRED G. THOMPSON, individually and as Director of the Department of Public Welfare of the District of Columbia
3. DONALD GRAY, individually and as Chief of the Public Assistance Division, Department of Public Welfare of the District of Columbia

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CIVIL DOCKET

DATE	PROCEEDINGS
1967	
July 7	Complaint, appearance; Exhibits "A" & "B"
July 7	Motion of Plaintiff For Preliminary Injunction; Affidavit; Memorandum; Appendix "A", "B" & "C"
July 7	Application of Pltff. for Convening of Three Judge District Court; P & A; Exhibit.

DATE	PROCEEDINGS
1967	
Aug 1	Designation of Honorable David L. Bazelon, Chief Judge, U.S.C.A. and Honorable Charles Fahy, Senior Circuit Judge to serve with the Honorable Alexander Holtzoff, United States District Judge as members of a three judge court. (N) (Original filed in C.A. 1497-67) Bazelon, CJ
Aug 2	Motion of defts to dismiss complaints or for summary judgment; exhibits A, B and C; P&A; statement
Aug 14	Opposition of pltf to defts' motion to dismiss or for summary judgment
Aug 21	Order permitting Clay Lee Legrant, individually and on behalf of her two minor children, to intervene without prepayment of costs or fees or to give security therefor. Holtzoff, J.
Aug 25	Counter-motion of pltfs for summary judgment; affidavit; statement; P&A; appendices A thru G; M.C.
Sep 7	Motion of pltfs for preliminary injunction and cross-motions for summary judgment argued and taken under advisement. (Reporter—G. Nevitt) Bazelon, C.J., Fahy, J.&Holtzoff,J.
Sep 11	Findings of Fact and Conclusions of Law granting preliminary injunction (N) Bazelon, C.J. & Fahy, J.
Sep 11	Order enjoining pendente lite or until further order of the Court defts from denying public assistance to pltfs. Bazelon, C.J. and Fahy, J. Dissent (N) Holtzoff, J. filed
Oct 16	Order permitting actions to be maintained as class actions. (original filed in C.A. 1497-67) Holtzoff, J.
Nov 8	Opinion finding one-year residence requirements of Section 3-203 (a) (b) of the Code are invalid in application to pltfs and those in like circumstances. (Judgment to be presented) (N) Bazelon, C. J. Fahy, Dissent: Holtzoff, J.

DATE	PROCEEDINGS
1967	
Nov 28	Order permanently enjoining defendants from enforcing or giving any legal effect to the provisions of Sections 3-203 (a) and (b), D.C. Code (1967 ed); from enforcing or giving any legal effect to such provisions of EL 9.I of the District of Columbia Department of public Welfare Handbook of Public Assistance and from refusing to process any application for aid to Families with Dependent Children, etc., (See order for Details) Bazelon, C.J., Fahy, J. Dissent Holtzoff, J.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1749-67

GLORIA JEAN BROWN

vs.

WALTER E. WASHINGTON, ET AL.

COMPLAINT

(for declaratory judgment and injunctive relief)

1. This is an action for a declaratory judgment to declare that enforcement of a requirement of residency within the District of Columbia for one year prior to application as a precondition to eligibility for public assistance deprives plaintiff's three children, and the class they represent, of rights to due process and equal protection of the law secured by the Fifth Amendment to the Constitution of the United States and further constitutes an unconstitutional infringement of the plaintiff's three children's right to free association guaranteed by the First Amendment to the Constitution, or in the alternative, to declare that each and every defendant has incorrectly interpreted the law of the District of Columbia by promulgating and enforcing regulations which result in the denial of public assistance to the plaintiff's three children, and all others similarly situated, on the ground that plaintiff's minor children are ineligible for public assistance in the District of Columbia because they have not lived in the District of Columbia one year prior to application for assistance, or, in the case of plaintiff's infant, because that infant was born before its mother satisfied the one year durational residency requirement.

2. This action also seeks a preliminary injunction and a permanent injunction restraining each and every defendant from refusing public assistance to plaintiff's children, and the class they represent, on the ground that the plaintiff's minor children are ineligible for public assistance because they do not satisfy requirements of one-year residency, and to require consideration of the application of plaintiff's three children for assistance without regard to such requirement of one-year residency; and to enjoin further the enforcement of the one year requirement of residency against plaintiff's three children, and all others similarly situated, as a prerequisite to eligibility for public assistance, as constituting a deprivation of rights to due process and equal protection secured by the Fifth Amendment to the Constitution of the United States and an inhibition to rights of free association guaranteed by the First Amendment to the Constitution.

3. Jurisdiction is conferred on this Court by Title 11, Section 521 of District of Columbia Code; by Title 28, 1343 of the United States Code providing for original jurisdiction of this Court in suits authorized by Title 42, Section 1983 of the United States Code; by Title 28, Section 2201 relating to declaratory judgments; and by Title 28, Sections 2282 and 2284 of the United States Code providing for a three-judge District Court wherever an application is made for an injunction restraining the enforcement, operation, or execution of any Act of Congress for repugnance to the Constitution of the United States.

4. Plaintiff Gloria Jean Brown, suing on behalf of three of her four minor children, is an adult citizen of the United States and has resided continuously with her oldest child within the District of Columbia since on or about February 5, 1966. She is the mother of the plaintiff children: Cassondra Brown, age 3; Felicia Brown, age 22 months; and Shawn Brown, age 7 months. She is also the mother of Henry Canady, age 5. Gloria Jean Brown and her oldest child have satisfied the one-year durational residency requirement and have been receiving public assistance under the Aid to Families With Dependent Children program since February, 1967. Cassondra Brown and Felicia Brown joined their mother in the District of

Columbia in August, 1966. Shawn Brown was born in the District of Columbia on November 12, 1966, when his mother had lived in the District of Columbia nine months.

5. Plaintiff's children are members of a class composed of District of Columbia needy children who have been denied public assistance of any kind by the Departmen of Public Welfare of the District of Columbia on the ground that they have not lived in the District of Columbia for one year prior to application for assistance, or in the case of infants, were born before their mother met the one-year durational residency requirement. Plaintiffs bring this action pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of themselves and all persons constituting the above class who are similarly situated. The persons in the class are so numerous that joinder of all members is impractical; there are questions of law or fact common to the class; the claims of the representative parties are typical of the claims of the class; and the representative parties will fairly and adequately protect the interests of the class.

6. Defendants: (a) Defendants, Walter N. Tobriner, John B. Duncar and Robert E. Mathe, are members of and constitute the District of Columbia Board of Commissioners, who pursuant to the provisions of D.C. Code 3-202 et seq. (Supp. V), are responsible for administering the District of Columbia Public Assistance Act of 1962, which authorizes programs entitled Aid to Families with Dependent Children (hereinafter referred to as AFDC) and General Public Assistance (hereinafter referred to as GPA), among other programs, and for establishing rules and regulations to carry out the provisions of the Act.

(b) Defendant Winifred G. Thompson is Director of the Department of Public Welfare of the District of Columbia, a governmental agency of the District of Columbia which has responsibility for the administration of AFDC, GPA, and other public assistance programs, and whose agents have enforced the policies and practices herein complained of. The Director of the Department of Public Welfare performs all the functions vested in the Board of Commissioners by the District of Columbia Public Assistance Act of 1962, except the adoption and promulga-

tion of regulations (D.C. Code § 3-220 (Supp. V); D.C. Code, Title I, Appendix, Reorg. Ord. No. 140 (Supp. V)).

(c) Defendant Donald Gray is Chief of the Public Assistance Division of the Department of Public Welfare, which Division has been delegated responsibility for the supervision of public assistance programs, including GPA and AFDC.

7. Plaintiff Gloria Jean Brown came to the District of Columbia from Arkansas on or about February 5, 1966. Plaintiff's oldest child, Henry Canady, had been living with plaintiff's father, Reese Alexander Brown, 4421 Georgia Avenue, Washington, D.C., since 1962. Plaintiff had been living with her mother and two daughters (Cassondra Brown, age 3 and Felicia Brown, age 22 months) in a public housing project in Fort Smith, Arkansas. Both Cassondra and Felicia were born in Arkansas. Plaintiff received public assistance for herself and her daughters from the State of Arkansas from March, 1965 until February, 1966. In February, 1966, when plaintiff's mother moved to Oklahoma in order to obtain employment, plaintiff was informed she was ineligible for public housing because she was only 20 years of age. Plaintiff then left her daughters, Felicia and Cassondra, temporarily in the care of her grandmother in Fort Smith, Arkansas, and moved to Washington, where her oldest child, father, four sisters, two brothers, grandmother, six aunts and seven uncles reside, and where plaintiff herself had lived as a child for a few years and attended school.

In the last week of August, 1966, plaintiff's daughters, Felicia and Cassondra, were brought to Washington at her request by train and rejoined their mother. Plaintiff's fourth child, Shawn Brown, was born on November 12, 1966, in the District of Columbia. Plaintiff intends to remain indefinitely in the District of Columbia.

8. Shortly before the birth of her fourth child, Shawn, plaintiff, in November, 1966, applied for public assistance on behalf of her minor children but was told by a public assistance caseworker that her family was not eligible for failure to satisfy the one-year durational residency requirement. Plaintiff reapplied for public assistance for herself and her oldest child, Henry Canady, and was ac-

cepted for AFDC in February, 1967, after receiving emergency assistance from the Department of Public Welfare for January, 1967. Upon reapplication, plaintiff was told that her daughters Felicia and Cassondra would not be eligible for public assistance until August, 1967, and that Shawn would not be eligible until he had become one-year old because at the time of his birth on November 12, 1966, his mother had not been a resident of the District of Columbia for one year. Plaintiff has received no public assistance payment for Felicia, Shawn, or Cassondra, from either the State of Arkansas or the District of Columbia.

9. Plaintiff had been informally advised by the Department of Public Welfare of the District of Columbia at her first visit to the Department in November, 1966, that her three youngest children would not be eligible for assistance from the District of Columbia until such time as they had lived in the District of Columbia for one continuous year. On June 27, 1967, Mrs. Brown formally applied for public assistance on behalf of her three youngest children; and by letter dated June 28, 1967, the application was rejected in writing by Mrs. Juanita N. Kydd, a social worker for the Department of Public Welfare responsible to and supervised by defendants Donald Gray and Winifred Thompson, on the ground that plaintiff's applicant children had not lived in the District of Columbia for one year prior to the date of application for public assistance, as required under the Agency's interpretation of D.C. Code 3-203, and in the case of the infant, Shawn, was not born at a time when his mother had lived in the District of Columbia for one year. A copy of the aforementioned letter dated June 28, 1967, is attached hereto as Exhibit A and is hereby incorporated by reference in this Complaint.

10. The regulations promulgated and enforced by the defendants, providing for denial of assistance to the plaintiff's three minor children, and all others similarly situated, because they have not resided in the District of Columbia for one continuous year prior to application or in the case of an infant less than one year old because the infant's mother had not resided in the District of Columbia for one year prior to the birth (District of Columbia,

Handbook of Public Assistance Policies and Procedures, EL 9.1, I and III, A) are contrary to District of Columbia Code 3-203, which provides in subsections (a), (b), and (c), read together, that assistance may be awarded to applicants such as the plaintiff's three minor children. Defendants have persisted in promulgating and enforcing regulations which deny assistance to any applicant for assistance (child or adult) who has not lived in the District of Columbia for one continuous year prior to application, or in the case of an infant less than one year old, if the applicant's mother had not resided in the District of Columbia for one year prior to the birth because they have erroneously construed District of Columbia Code 3-203 to forbid the authorization of assistance to any applicant (child or adult) who does not fulfill the one year durational residency requirement.

11. Defendant's refusal to consider further plaintiff's application for public assistance on behalf of her three minor children, Felicia, Shawn, and Cassondra, because they have not resided in the District of Columbia for one continuous year prior to application, or in the case of the infant less than one year old because its mother had not resided in the District of Columbia for one year prior to birth in the District of Columbia (3-203(b)), is contrary to the Constitution of the United States, to wit:

(a) The one-year residence requirement allegedly set forth by District of Columbia Code 3-203(a) and in the regulations implementing said subsection (District of Columbia, Handbook of Public Assistance Policies and Procedures, EL 9.1), and the special residency requirements applicable to infants less than one year old set forth in 3-203(b) create unreasonable, arbitrary, and discriminatory classifications among needy children and infants less than one year old who are residents of the District of Columbia in violation of due process and the equal protection of the laws under the Fifth Amendment to the Constitution of the United States, in that plaintiff's children and all those similarly situated are denied aid solely because they have not lived in the District of Columbia for one year preceding application, or in the case of an infant less than one year old because its mother had not

lived in the District of Columbia for one year preceding the birth, without regard to the purposes of public assistance set forth in D.C. Code 202(b)(1), the purposes of AFDC set forth in 42 U.S.C. 601, the resident status of the children's parent, or in the case of an infant less than one year old, the infant's place of birth. Said regulations implementing Section 203 of Title 3 are attached hereto as Exhibit B and are hereby incorporated by reference in this complaint.

(b) The enforcement of any residency requirement as a prerequisite for eligibility for public assistance is an abridgement of the rights of plaintiff's children, and all others similarly situated, as citizens of the United States, to move freely from state to state, to settle freely and without hinderance in the state of their choice, and to associate freely with relatives and friends, in violation of due process of law under the Fifth Amendment to the Constitution of the United States and in violation of freedom of association protected under the First Amendment to the Constitution.

12. Plaintiff alleges on information and belief that her children, Felicia, Shawn, and Cassondra are eligible for public assistance on all other grounds of eligibility other than one year continuous residency in the District of Columbia prior to application or, in the case of Shawn, that his mother had not lived in the District of Columbia for one year preceding his birth.

13. Plaintiff, and all others similarly situated, on whose behalf this suit is brought, are suffering irreparable injury and are threatened with irreparable injury in the future by reason of the acts of defendants hereinbefore set forth. Due to refusal of defendants to further consider her application for public assistance on behalf of her three minor children despite their eligibility for assistance on all grounds other than one year residency, the three minor children of plaintiff have no dependable or adequate source of support. Plaintiff receives only $125 per month for the support of herself and four minor children. She pays $79.50 per month for rental of a three-room apartment at 4662 Hillside Road, S.E. Plaintiff is eligible for food stamps but must pay $34 per month for

food stamps worth $80 in food. After paying for rent and food stamps, plaintiff is left with $11.50 per month to pay utilities, buy clothing, etc. Plaintiff receives no support for her children from any source except public assistance. She is unable to work because she is needed at home to care for her young children and has no suitable child care plan. Plaintiff's relatives are financially unable to help her and do not currently assist her, although her father and aunt provided shelter and food during plaintiff's first nine months in the District of Columbia. Plaintiff's father, Reese Alexander Brown, is a janitor at the eighth precinct, has three dependents of his own, and cannot contribute to the support of plaintiff and her four children. In order to keep the family together and prevent commitment of plaintiff's three minor children to Junior Village of the District of Columbia, an institution for dependent children, Family and Child Services of the District of Columbia provided money for the purchase of food stamps for plaintiff's three minor children during June, 1967. The denial of public assistance benefits to three of plaintiff's four children may result in the necessity of institutionalizing the children in Junior Village, thereby causing irreparable injury to the family life well being, and physical and psychological health of plaintiff's children.

14. Unless enjoined by the Court, defendants will continue to refuse assistance to the plaintiff's children, and all other children similarly situated, for public assistance on the ground that they have not lived here for one continuous year prior to application or in the case of an infant less than one year old, that his mother had not lived in the District of Columbia for one year preceding its birth.

PRAYER FOR RELIEF

WHEREFORE, plaintiff respectfully prays on behalf of her three named minor children and those children similarly situated:

1. That a three-judge Court be convened to determine this controversy pursuant to Title 28, Section 2284, of the United States Code.

2. That this Court enter a declaratory judgment pursuant to 28 U.S.C. 2201 declaring that District of Columbia Code 3-203 makes it discretionary with the Commissioners of the District of Columbia and the District of Columbia Public Welfare Department to award assistance to resident applicants who have not lived in the District of Columbia for one year and who are within the categories of assistance set forth in District of Columbia Code, 3-202; that the Court declare the defendants' regulations implementing D.C. Code Section 3-203 void and unenforceable as erroneous interpretations of D.C. Code Section 3-203; and that this Court retain jurisdiction over this case with the purpose of future determination of the constitutional issues raised herein if the defendants fail to further consider the applications of plaintiff's children and all other children similarly situated without regard to duration of residence in the District of Columbia.

3. That if this Court finds that District of Columbia Code 3-203 does in fact impose a mandatory requirement of one year residence in the District of Columbia before eligibility for public assistance can be established, that this Court enter a declaratory judgment pursuant to Title 28, Section 2201, declaring that District of Columbia Code 3-203(a) and 3-203(b) and the regulations implementing those subsections, as contained in EL 9.1 of the Handbook of Public Assistance Policies and Procedures, are repugnant to the First and Fifth Amendments to the Constitution of the United States, and that the defendants, and each of them, are required by the Constitution of the United States to consider the application of plaintiff's children, and all others similarly situated, for public assistance without reference to such statute.

4. That this Court enter a preliminary and permanent injunction restraining each defendant, their successors in office, agents, and employees from enforcing District of Columbia Code 3-203(a) and 3-203(b), or the regulations implementing those subsections, and ordering them further to consider the application for public assistance of plaintiff's three named children, and all others similarly

situated, on the basis that the statute, in imposing a requirement of one year residency in the District of Columbia as a prerequisite for eligibility for public assistance, is violative of the rights of the plaintiff's children under the First and Fifth Amendments to the Constitution of the United States.

5. That this Court order defendants, Winifred Thompson and Donald Gray, if upon further processing of the applications of plaintiff's three named children said children are determined under appropriate regulations to be eligible for public assistance, to establish plaintiff's children's eligibility retroactively to the date of the first application for public assistance by the plaintiff on behalf of the named minor children and to disburse benefits retroactive to such date whereon plaintiff's children would have become eligible for AFDC without regard to D.C. Code 3-203.

6. That this Court allow plaintiff her costs herein, and grant her named children, and all others similarly situated, such further, other, additional, or alternative relief as may appear to the Court to be just and appropriate.

* * * *

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1497-67 1749-67

* * * *

CLAY MAE LEGRANT, * * * INTERVENOR-PLAINTIFF

vs.

WALTER E. WASHINGTON, ET AL.

INTERVENOR'S COMPLAINT
(for declaratory judgment and injunctive relief)

1. This is an action for a declaratory judgment to declare that enforcement of a requirement of residency within the District of Columbia for one year prior to application as a precondition to eligibility for public assistance deprives plaintiffs, and the class they represent, of rights to due process and equal protection of the law secured by the Fifth Amendment to the Constitution of the United States and further constitutes an unconstitutional infringement of the plaintiff's right to free association guaranteed by the First Amendment to the Constitution, or in the alternative to declare that each and every defendant has incorrectly intepreted the law of the District of Columbia by promulgating and enforcing regulations which result in the denial of public assistance to the plaintiffs, and all others similarly situated, on the ground that plaintiff and her minor children are ineligible for public assistance in the District of Columbia because they have not lived in the District of Columbia one year prior to application for assistance.

2. This action also seeks a preliminary injunction and a permanent injunction restraining each and every defendant from refusing public assistance to plaintiffs, and

the class they represent, on the ground that the plaintiff and her minor children are ineligible for public assistance because they do not satisfy requirements of one-year residency, and to require consideration of the application of plaintiffs for assistance without regard to such requirement of one-year residency; and to enjoin further the enforcement of the one year requirement of residency against plaintiffs and all others similarly situated, as a prerequisite to eligibility for public assistance, as constituting a deprivation of rights to due process and equal protection secured by the Fifth Amendment to the Constitution of the United States and an inhibition to rights of free association guaranteed by the First Amendment to the Constitution.

3. Jurisdiction is conferred on this Court by Title 11, Section 521 of District of Columbia Code; by Title 28, 1343 of the United States Code providing for original jurisdiction of this Court in suits authorized by Title 42, Section 1983 of the United States Code; by Title 28, Section 2201 relating to declaratory judgments; and by Title 28, Sections 2282 and 2284 of the United States Code providing for a three-judge District Court wherever an application is made for an injunction restraining the enforcement, operation, or execution of any Act of Congress for repugnance to the Constitution of the United States.

4. Plaintiff, Clay Mae Legrant, is an adult citizen of the United States and has resided continuously within the District of Columbia since March 15, 1967. She is the mother of the plaintiff children: Brenda Gail Legrant, age 5, and Andrew Legrant, age 1. Both children have resided with their mother in the District since March 15, 1967, when they arrived here with their mother from South Carolina.

5. Plaintiffs are members of a class composed of District of Columbia resident mothers and needy children who have been denied public assistance of any kind by the Department of Public Welfare of the District of Columbia on the ground that they have not lived in the District of Columbia for one year prior to application for assistance. Plaintiffs bring this action pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of themselves

and all persons constituting the above class who are similarly situated. The persons in the class are so numerous that joinder of all members is impractical; there are questions of law or fact common to the class; the claims of the representative parties are typical of the claims of the class; and the representative parties will fairly and adequately protect the interests of the class. The prosecution of separate actions by or against individual members of the class would create a risk of inconsistent or varying adjudications with respect to individual members of the class; adjudications with respect to individual members of the class would as a practical matter be dispositive of other members not parties to the adjudications; and further, defendants have denied public assistance to plaintiffs and others similarly situated on grounds generally applicable to the class.

6. Defendants: (a) Defendant Board of Commissioners, pursuant to the provisions of D.C. Code 3-202 et seq. (Supp. V), is responsible for administering the District of Columbia Public Assistance Act of 1962, which authorizes programs entitled Aid to Families with Dependent Children (hereinafter referred to as AFDC) and General Public Assistance (hereinafter referred to as GPA), among other programs, and establishing rules and regulations to carry out the provisions of the Act. Defendants Walter N. Tobriner, John B. Duncan and Brig. Gen. Robert E. Mathe are members of and constitute the defendant Board of Commissioners.

(b) Defendant Winifred G. Thompson is Director of the Department of Public Welfare of the District of Columbia, a governmental agency of the District of Columbia which has responsibility for the administration of AFDC, GPA, and other public assistance programs and whose agents have enforced the policies and practices herein complained of. The Director of the Department of Public Welfare performs all the functions vested in the Board of Commissioners by the District of Columbia Public Assistance Act of 1962, except the adoption and promulgation of regulations (D.C. Code § 3-220 (Supp. V); D.C. Code, Title I, Appendix, Reorg. Ord. No. 140 (Supp. V)).

(c) Defendant Donald Gray is Chief of the Public Assistance Division of the Department of Public Welfare, which Division has been delegated responsibility for the supervision of public assistance programs, including GPA and AFDC.

7. Plaintiff-intervenor, Clay Mae Legrant, came to the District of Columbia with her two children from South Carolina on March 15, 1967. She and her children have lived here continuously since that date. Plaintiff came to the District of Columbia after the death of her mother in order to be with her sister, who was living in the District of Columbia and because her younger brother had promised to join her here after his return from Vietnam. She had hoped to be self-supporting until such time as her brother was discharged from the Army in November, 1967. Plaintiff intends to remain permanently in the District of Columbia.

8. Being pregnant and arthritic and being unable because of her health and pregnancy to obtain anything other than occasional employment as a domestic on a day basis, plaintiff went to the District of Columbia Department of Public Welfare to apply for public assistance on behalf of herself and her two minor children.

This application was rejected by a Notice of Ineligibility dated July 27, 1967 from defendant, Donald Gray, on the ground that plaintiff and her two minor children had not lived in the District of Columbia for one continuous year prior to the date of application for public assistance, as required under the Agency's interpretation of D.C. Code 3-203. A copy of the Notice of Ineligibility dated July 27, 1967 is attached hereto as Exhibit A and is hereby incorporated by reference in this Complaint.

9. The regulations enforced by the defendants, providing for denial of assistance to the plaintiff and her two minor children, and all others similarly situated, because they have not resided in the District of Columbia for one continuous year prior to application (District of Columbia, Handbook of Public Assistance Policies and Procedures, EL 9.1, I and III) are contrary to District of Columbia Code 3-203, which provides in subsections (a) and (c), read together, that assistance may be awarded to appli-

cants such as the plaintiff and her two minor children. Defendants have persisted in denying assistance to any applicant for assistance who has not lived in the District of Columbia for one continuous year prior to application because they have erroneously construed District of Columbia Code 3-203 to forbid the authorization of assistance to any applicant who does not fulfill the one year residency requirement.

10. Defendant's refusal to consider further plaintiff's application for public assistance on behalf of her two minor children, and all others similarly situated, because they have not resided in the District of Columbia for one continuous year prior to application is contrary to the Constitution of the United States, to wit:

(a) The one year residence requirement allegedly set forth by District of Columbia Code 3-203, and in the regulations implementing said section (District of Columbia, Handbook of Public Assistance Policies and Procedures, EL 9.1), creates an unreasonable, arbitrary, and discriminatory classification among needy children who are residents of the District of Columbia in violation of due process and the equal protection of the laws under the Fifth Amendment to the Constitution of the United States, in that plaintiff's children and all those similarly situated are denied aid solely because they were born in another jurisdiction and have not lived here one year without regard to the purposes of public assistance set forth in D.C. Code, 202 (b) (1) and the purposes of AFDC set forth in 42 U.S.C. 601.

(b) The enforcement of any residency requirement as a prerequisite for eligibility for public assistance is an abridgement of the rights of plaintiffs, and all others similarly situated, as citizens of the United States, to move freely from state to state, to settle freely and without hinderance in the state of their choice, and to associate freely with relatives and friends, in violation of due process of law under the Fifth Amendment to the Constitution of the United States and in violation of freedom of association protected under the First Amendment to the Constitution.

11. Plaintiff alleges on information and belief that she and her children are eligible for public assistance on all other grounds of eligibility other than one year continuous residency in the District of Columbia.

12. Plaintiff, and all others similarly situated, on whose behalf this suit is brought, are suffering irreparable injury and are threatened with irreparable injury in the future by reason of the acts of defendants hereinbefore set forth. Due to refusal of defendants to further consider her application for public assistance on behalf of her two minor children despite their eligibility for assistance on all grounds other than one year residency, the two minor children of plaintiff have no dependable source of support. Plaintiff and her children are living in a one bedroom apartment in a condemmed building at 704 Second Street, N.W., which has been taken over by the Redevelopment Land Agency. Plaintiff is medically unable to work, and her relatives are financially unable to support her and her two children. Plaintiff has been living with a sister, Mrs. Martha Graham, and a neice, Miss Carrie Lee Graham. Mrs. Graham's only income is from public assistance, and Miss Graham earns $39.66 a week as a hairdressers [sic] in Maryland. These relatives have paid the $42 a month rent in the Second Street apartment and have been providing food for plaintiff and her family. On August 12, 1967 Mrs. Graham was moved into an efficiency public housing unit, leaving only plaintiff's niece to care for plaintiff and her two children. Plaintiff and her two children have no other source of support, since the father of plaintiff's children does not contribute to the support of the children and his current whereabouts are unknown. In order to keep the family together and prevent commitment of plaintiff's two minor children to Junior Village of the District of Columbia, an institution for dependent children, Family and Child Services of the District of Columbia has provided money for the purchase of food for plaintiff's two minor children. The denial of public assistance benefits may result in the necessity of institutionalizing the children, thereby causing irreparable injury to the family life, well being, and physical and psychological health of plaintiff's children.

13. Unless enjoined by the Court, defendants will continue to refuse assistance to the plaintiffs, and all other [sic] similarly situated, for public assistance on the ground that they have not lived here for one continuous year prior to application.

PRAYER FOR RELIEF

THEREFORE, plaintiffs respectfully pray on behalf of themselves and those similarly situated:

1. That a three-judge court be convened to determine this controversy pursuant to Title 28, Section 2284, of the United States Code.

2. That this Court enter a declaratory judgment pursuant to 28 U.S.C. 2201 declaring that District of Columbia Code 3-203 makes it discretionary with the Commissioners of the District of Columbia and the District of Columbia Public Welfare Department to award assistance to resident applicants who have not lived in the District of Columbia for one year and who are within the categories of assistance set forth in District of Columbia Code 3-202, that the Court declare the defendant's regulations implementing D.C. Code Section 3-203 void and unenforceable as erroneous interpretations of D.C. Code Section 3-203, and that this Court retain jurisdiction over this case with the purpose of future determination of the constitutional issues raised herein if the defendants fail to further consider the applications of plaintiffs and all others similarly situated without regard to duration of residence in the District of Columbia.

3. That if this Court finds that District of Columbia Code 3-203 does in fact impose a mandatory requirement of one year residence in the District of Columbia before eligibility for public assistance can be established, that this Court enter a declaratory judgment pursuant to Title 28, Section 2201, declaring the District of Columbia Code 3-203, and the regulations implementing that requirement, as contained in EL 9.1 of the Handbook of Public Assistance Policies and Procedures, are repugnant to the Constitution of the United States, and that the defendants,

and each of them, are required by the Constitution of the United States to consider the application of plaintiffs, and all others similarly situated, for public assistance without reference to such statute.

4. That this Court enter a preliminary and permanent injunction restraining each defendant, their successors in office, agents, and employees from enforcing District of Columbia Code 3-203 or the regulations implementing that section, and ordering them to further consider the application for public assistance of plaintiff and her two children and all others similarly situated on the basis that the statute, in imposing a requirement of one year residency in the District of Columbia as a prerequisite for eligibility for public assistance is violative of the rights of the plaintiffs under the First and Fifth Amendments to the Constitution of the United States.

5. That this Court order defendants, Winifred Thompson and Donald Gray, if upon further processing of the application of plaintiff and her named minor children, the Department deems them to be eligible for public assistance, to establish plaintiff's and her children's eligibility retroactively to the date of the first application for public assistance by the plaintiff on behalf of the named minor children and to disburse benefits retroactive to such date whereon plaintiff and her children would have become eligible for AFDC without regard to D.C. Code 3-203.

6. That this Court allow plaintiffs their costs herein, and grant them and all others similarly situated such further, other, additional, or alternative relief as may appear to the Court to be just and appropriate.

* * * *

[Jurat Omitted in Printing]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title Omitted in Printing]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of Fact

Upon the basis of information now before the court, the court finds that:

1. Plaintiffs are Minnie Harrell, individually and for her minor children, Yvonne Harrell, Virginia Harrell, and Gwendolyn Harrell; Gloria Jean Brown, for her minor children, Cassondra Brown, Felicia Brown, and Shawn Brown; and Vera M. Barley.

2. Intervenor-Plaintiff is Clay Mae Legrant, individually and for her minor children, Brenda Gail Legrant and Andrew Legrant.

3. Defendants are Walter N. Tobriner, individually and as President of the Board of Commissioners of the District of Columbia; John B. Duncan and Robert E. Mathe, individually and as members of the Board of Commissioners of the District of Columbia; Winifred G. Thompson, individually and as Director of the Department of Public Welfare of the District of Columbia; Donald Gray, individually and as Chief of the Public Assistance Division, Department of Public Welfare of the District of Columbia; and Vivian Jodon, Chief of Intake, Public Assistance Division, Department of Public Welfare of the District of Columbia.

4. Plaintiff Minnie Harrell and her two children arrived in the District of Columbia from New York on, and have continuously resided here since, September 3, 1966.

5. Plaintiff Gloria Jean Brown arrived in the District of Columbia from Arkansas on, and has continuously re-

sided here since, February 5, 1966. Two of her plaintiff children arrived in the District of Columbia from Arkansas in, and have continuously resided here since, late August, 1966. Her third plaintiff child was born in the District on, and has continuously resided here since, November 12, 1966.

6. Plaintiff Vera M. Barley arrived in the District of Columbia in, and has continuously resided here since, March, 1941. On April 1, 1941, she was committed to St. Elizabeths Hospital, where she has remained to this date. She has been deemed eligible for release into a foster care home in the community since September 15, 1965.

7. Intervenor-Plaintiff Clay Mae Legrant and her two children arrived in the District of Columbia from South Carolina on, and have continuously resided here since, March 15, 1967.

8. Defendants are variously charged with the powers and duties of establishing rules and regulations for the administration of public assistance in the District of Columbia, determining the eligibility of applicants, awarding funds, and generally supervising the public assistance program in the District of Columbia.

9. Defendants have construed Title 3, Section 203, of the District of Columbia Code (1967) so as to authorize the award of public assistance only to or on behalf of persons who have continuously resided in the District of Columbia for one year immediately preceding application for assistance. In consequence of this interpretation, defendants have promulgated regulations which variously provide that:

(a) in order to qualify for Aid to Families with Dependent Children, the child must have been a resident of the District for one year immediately preceding application;

(b) in order to qualify for Aid to the Permanently and Totally Disabled and for General Public Assistance, the applicant must have been a resident of the District of Columbia for one year immediately preceding his application;

(c) time spent in an institution as a public charge during the first year of living in the District of Columbia does not count toward establishing residence here;

(d) residence in the District of Columbia is acquired, in the case of a child born in the District, only if or at the time that the parent or caretaker relative of the child has resided in the District for one year preceding the child's birth;

(e) residence is not acquired while the applicant is a patient or inmate of any public institution, such as a hospital or sanitarium.

10. On May 12, 1967, Minnie Harrell applied for public assistance on behalf of her three minor children. On the same date, defendant Donald Gray rejected this application on the ground that the children had "not lived in the District of Columbia for one year prior the date of your application . . . ."

11. Shortly before the birth of her fourth child in November, 1966, plaintiff Gloria Jean Brown applied for public assistance. A caseworker informed plaintiff that she and her family were not eligible for public assistance because they had not satisfied the one-year residency requirement. Plaintiff re-applied in early 1967, but was advised that two of her children would not be eligible until August, 1967, and that her youngest child would not be eligible until November, 1967.

12. Plaintiff Vera M. Barley applied for public assistance. On February 23, 1967, defendant Donald Gray rejected her application on the ground that plaintiff had not resided in the District of Columbia for one year prior to hospitalization. On March 15, 1967, plaintiff requested an administrative hearing pursuant to Title 3, Section 214, of the District of Columbia Code (1967). On April 13, 1967, an administrative hearing was held; and on May 5, 1967, Hearing Officer Elbert D. Gadsden sustained the action of the Department of Public Welfare.

13. Intervenor-Plaintiff Clay Mae Legrant applied for public assistance. On July 27, 1967, defendant Donald Gray rejected her application on the ground that plaintiff and her two minor children had not lived in the District of Columbia "for one year prior to application."

14. All of the plaintiffs arrived in the District of Columbia for bona fide reasons disassociated from a purpose to obtain public assistance, and intend to remain in the District indefinitely.

15. If plaintiffs do not receive financial assistance they will suffer irreparable loss, injury, and damage. Plaintiffs Minnie Harrell and Gloria Jean Brown and plaintiff-intervenor Clay Mae Legrant are unable to work and do not have sufficient funds with which to pay for rent, food, and clothing for their children. As a result, plaintiff children may have to be committed to Junior Village, an institution for dependent children. Plaintiff Vera M. Barley, though eligible to be released from Saint Elizabeths Hospital, is unable to leave St. Elizabeths since she does not have sufficient funds to pay for the costs of a foster care home. She cannot obtain such funds without public assistance.

Conclusions of Law

1. This court has jurisdiction over the parties and the subject matter.

2. Plaintiffs have raised substantial questions in respect of the constitutionality of Title 3, Section 203, of the District of Columbia Code (1967) and certain regulations promulgated pursuant thereto. *Green* v. *Department of Public Welfare of Delaware*, C.A. No. 3349, D. Del., June 28, 1967; *Thompson* v. *Shapiro*, C.A. No. 11,-821, D. Conn., June 19, 1967; *Smith* v. *Reynolds*, C.A. No. 42419, E.D. Pa., June 5, 1967.

3. Plaintiffs are entitled to a preliminary injunction as prayed.

/s/ David L. Bazelon
Chief Circuit Judge

/s/ Charles Fahy
Senior Circuit Judge

Dated: September 11, 1967.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title Omitted in Printing]

MOTION OF DEFENDANTS TO DISMISS THE COMPLAINTS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

The defendants hereby move the Court to dismiss the complaints filed herein on the ground that they fail to state a claim against the defendants upon which relief can be granted. In the alternative, the defendants move the Court to enter summary judgment in their favor on the ground that a reading of the complaints filed herein, together with Exhibits "A", "B", and "C" attached hereto and by reference made a part hereof, demonstrate that there is no genuine issue as to any material fact and that the defendants are entitled to judgment as a matter of law.

* * * *

[Certificate of Service Omitted in Printing]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title Omitted in Printing]

COUNTER-MOTION OF PLAINTIFFS
FOR SUMMARY JUDGMENT

The plaintiffs hereby move the Court to enter summary judgment in their favor on the ground that a reading of the verified complaints filed herein, together with the affidavits in support of the motions for preliminary injunction in the above-captioned cases, and the affidavit in support of motion for summary judgment, attached hereto, demonstrate that there is no genuine issue as to any material fact and that the plaintiffs are entitled to judgment as a matter of law.

* * * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1497-67

MINNIE HARRELL, ET AL., PLAINTIFFS
CLAY MAE LEGRANT, PLAINTIFF-INTERVENOR

v.

WALTER N. TOBRINER, ET AL., DEFENDANTS

Civil Action No. 1579-67

VERA M. BARLEY, ET AL., PLAINTIFFS

v.

WALTER N. TOBRINER, ET AL., DEFENDANTS

Civil Action No. 1749-67

GLORIA JEAN BROWN, ET AL., PLAINTIFFS
CLAY MAE LEGRANT, PLAINTIFF-INTERVENOR

v.

WALTER N. TOBRINER, ET AL., DEFENDANTS

OPINION

David H. Marlin, of Washington, D. C., and Laurens H. Silver, of Washington, D. C., for plaintiffs.

Charles T. Duncan, Corporation Counsel, and John A. Earnest and John H. Suda, Assistant Corporation Counsel, for defendants.

Before BAZELON, Chief Circuit Judge, FAHY, Senior Circuit Judge, and HOLTZOFF, District Judge.

FAHY, Circuit Judge. Plaintiffs and intervenor,[1] all now to be referred to as plaintiffs, in slightly differing

[1] See note 3 *infra*.

factual situations applied for public assistance under the District of Columbia Public Assistance Act of 1962, Title 3, Chapter 2, D.C. Code (1967). Defendants, who have official responsibility in the matter, denied the applications. The sole ground of denial was that plaintiffs and the minor children on whose behalf they sought aid had not complied with the residence requirements of D.C. Code § 3-203(a), (b) (1967), set forth in the margin insofar as pertinent to this case,[2] and with the regulations promulgated pursuant to the statute. Plaintiffs seek relief by declaratory judgments and injunctions against enforcement by defendants of such residence requirements.[3] The complaints proceed on two theories, first, that Section 3-203 vests a discretion in the defendants to disregard the one-year residence requirements, and they have not exercised such discretion, and, second, that if there is no such discretion the one-year residence requirements of Section 3-203 are constitutionally invalid.

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[2] § 3-203. Eligibility for public assistance.

Public assistance shall be awarded to or on behalf of any needy individual who either (a) has resided in the District for one year immediately preceding the date of filing his application for such assistance; or (b) who was born within one year immediately preceding the application for such aid, if the parent or other relative with whom the child is living has resided in the District for one year immediately preceding the birth; or (c) is otherwise within one of the categories of public assistance established by this chapter: . . .

[3] In the case of plaintiff Minnie Harrell and her co-plaintiffs neither she nor they had resided in the District a year when she applied. In the case of Gloria Jean Brown, et al., who sues on behalf of three children, the children had not resided a year here when application for them was made. In the case of Vera M. Barley the denial of her application was on the ground that her residence at St. Elizabeths Hospital for a period which otherwise was more than adequate could not be considered because under the regulations residence could not be "gained" while one was confined to a public institution. She has been deemed competent since September 15, 1965, but is without financial resources sufficient to obtain care in a foster home, which prevents her, without public assistance, leaving St. Elizabeths. In the case of intervenor Clay Mae LeGrant neither she nor her children had resided here a year when applications for them were made.

This three-judge District Court was convened pursuant to 18 U.S.C. § 2282[4] and was composed under the provisions of 18 U.S.C. § 2284.

On September 11, 1967, after argument, we granted the motion of plaintiffs for a preliminary injunction pendente lite or until the further order of the court.[5] We accompanied our order with Findings of Fact and Conclusions of Law, the findings setting forth in detail the factual situation of each plaintiff, which still prevails in essential respects. The matter is decided now on motions for summary judgment submitted by both plaintiffs and defendants, enabling us to decide the merits, there being no genuine issues of material fact requiring an evidentiary hearing.

I

We agree with defendants that Section 3-203 does not grant defendants a discretion to disregard the one-year residence requirements applicable to plaintiffs. This construction is supported not only by the language of the

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[4] 28 U.S.C. § 2282:

> An interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

[5] The order in its operative part reads:

> That the defendants, Walter N. Tobriner, individually and as President of the Board of Commissioners of the District of Columbia; John B. Duncan and Robert E. Mathe, individually and as members of the Board of Commissioners of the District of Columbia; Winifred G. Thompson, individually and as Director of the Department of Public Welfare of the District of Columbia; Donald Gray, individually and as Chief of the Public Assistance Division, Department of Public Welfare of the District of Columbia; and Vivian Jodon, Chief of Intake, Public Assistance Division, Department of Public Welfare of the District of Columbia, be, and hereby are, enjoined, pendente lite or until further order of the court, from denying public assistance to plaintiffs by reason of any of the one-year residence requirements of Title 3, Section 203, of the District of Columbia Code (1967) and regulations thereunder. [District Judge Holtzoff's dissent was noted on the order.]

statute but also by its legislative history. The Senate District of Columbia Committee in its Report on the Act stated that one of the congressional purposes was to

> (c) Make uniform in all categories a 1-year residence requirement for public assistance eligibility. (S. Rep. No. 844, 87th Cong., 1st Sess. (1961).)

The administrators of the program have consistently interpreted the statute as the legislative history thus indicates Congress intended, that is, that the language "public assistance shall be awarded" to those who meet the one-year conditions means that the assistance is not to be granted unless those conditions are met. This consistent and reasonable interpretation by those charged with the duty of administering the statute is entitled to great weight. *Zemel* v. *Rusk*, 381 U.S. 1, 11; *Udall* v. *Tallman*, 380 U.S. 1, 16; *United States* v. *American Trucking Association*, 310 U.S. 534, 549. Moreover, we independently interpret the language used by Congress in like manner. It becomes our duty therefore to decide the validity of the challenged parts of the statute as so construed.[6]

II

A court approaches its responsibility of passing upon the constitutional validity of an Act of Congress aware that Congress also interprets the Constitution. This is so even though Congress' judgment is manifested, as in the present case, merely by passage of the legislation

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[6] None of the parties questions the application of Section 2282 on the ground that the Code provision is not an "Act of Congress" within the meaning of Section 2282. In this connection see *Hobson* v. *Hansen*, 265 F. Supp. 902. *Flemming* v. *Nestor*, 363 U.S. 603, is not to the contrary, for there the issue of constitutional validity of the statute arose and was decided under judicial review procedures established by the statute under which the determination arose, not by direct suit such as we have to enjoin the operation of a statute and regulations thereunder. In this connection we bear in mind also the three-judge District Court requirements of 18 U.S.C. § 2281, applicable to the challenge of state-wide legislation. The District of Columbia, though not a state, is comparable to a state in considering this problem.

rather than by explicit treatment of the constitutional question. Moreover, as Mr. Justice Goldberg stated for the Court in *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 159:

> Since the validity of an Act of Congress is involved, we begin our analysis mindful that the function we are now discharging is "the gravest and most delicate duty that this Court is called upon to perform." *Blodgett* v. *Holden*, 275 U.S. 142, 148 (separate opinion of Holmes, J.). This responsibility we here fulfill with all respect for the powers of Congress, but with recognition of the transcendent status of our Constitution.

In *Trop* v. *Dulles*, 356 U.S. 86, 103-04, Mr. Chief Justice Warren had stated the matter as it must be considered:

> The provisions of the Constitution are not time-worn adages or hollow shibboleths. They are vital, living principles that authorize and limit governmental powers in our Nation. They are the rules of government. When the constitutionality of an Act of Congress is challenged in this Court, we must apply those rules. If we do not, the words of the Constitution become little more than good advice.
>
> When it appears that an Act of Congress conflicts with one of these provisions, we have no choice but to enforce the paramount command of the Constitution. We are sworn to do no less. . . . We do well to approach this task cautiously, as all our predecessors have counseled. But the ordeal of judgment cannot be shirked.

In line with the caution thus admonished, applicable to us certainly no less than to the Supreme Court, we should construe the challenged portions of Section 3-203 so as to avoid a serious constitutional question if reasonably able to do so. *United States* v. *Rumely*, 345 U.S. 41, 45. But it seems clear to us that Congress intended to impose one-year residence requirements as conditions, similar to conditions prevailing in numerous other jurisdictions. There is no evidence of a congressional intent to

depart from a rather widespread legislative pattern in this area. This pattern lends support to defendants' interpretation of Section 3-203 as precluding a discretion on their part to disregard the requirements. Our agreement with defendants' interpretation requires us to reach the constitutional question.

Any weight the legislative pattern gives to defendants' constitutional position, however, as distinguished from their statutory interpretation, we think is overcome by considerations which stem primarily from the equal protection of the laws guaranteed by the Fourteenth Amendment and applicable to this jurisdiction by reason of the Due Process Clause of the Fifth Amendment.[7]

Notwithstanding the frequent use of such a residence condition, only recently has it come before federal courts for decision as to its validity. Nine federal judges, in three separate cases, with one judge dissenting, have recently considered the constitutional questions involved. *Thompson* v. *Shapiro*, 270 F. Supp. 331 (a three-judge District Court of the District of Connecticut); *Green* v. *Department of Public Welfare*, 270 F. Supp. 173 (a three-judge District Court of the District of Delaware); and *Smith* v. *Reynolds*, —— F. Supp. —— (a three-judge District Court of the Eastern District of Pennsylvania). In *Thompson* and *Green* the residence requirements, respectively, of Connecticut and Delaware, were held unconstitutional. In *Smith* v. *Reynolds* a final decision has not been reached, but enforcement of such a requirement in Pennsylvania has been enjoined preliminarily on constitutional grounds.

In *Thompson* the court first concluded the provision constituted an arbitrary classification in violation of the Fourteenth Amendment's prohibition against state abridgment of the privilege and immunity of a citizen of the United States to enjoy the liberty to travel interstate. The court relied heavily upon *Edwards* v. *California*, 314

[7] Denial of equal protection offends the Due Process Clause of the Fifth Amendment, applicable to this jurisdiction, as well as the Equal Protection Clause of the Fourteenth, applicable in terms to the States. *Bolling* v. *Sharpe*, 347 U.S. 497; *Schneider* v. *Rusk*, 377 U.S. 163, 168.

U.S. 160. The court also relied upon a more general liberty of the citizen to travel, upheld by the Supreme Court in the passport cases, including *Kent* v. *Dulles*, 357 U.S. 116, 126-127, and *United States* v. *Guest*, 383 U.S. 745, 759. The *Thompson* court said:

> the right to travel exists and included within its dimensions is the right to establish residence in Connecticut. Denying to the plaintiff even a gratuitous benefit because of her exercise of her constitutional right effectively impedes the exercise of that right.

270 F. Supp. at 336.

Second, the court in *Thompson* decided that the Equal Protection Clause of the Fourteenth Amendment was violated:

> . . . the classifications of one year's residence or a job are not reasonable in light of the purpose of § 17-2d because again there is no showing that those applicants will be lesser burdens than applicants without jobs or one year's residence. Section 17-2d, in brief, violates the equal protection clause because even if its purpose were valid, [to protect the finances of the states] which it is clearly not, the classifications are unreasonable.

Id. at 338.

In *Green*, the court, in holding invalid the Delaware one-year requirement for public assistance, said that the test under the Equal Protection Clause was whether the classification based on residence was reasonably related to the purpose of the statute, citing *Morey* v. *Doud*, 354 U.S. 457. The court then pointed out that the purpose of the public assistance program was " 'to promote the welfare and happiness of all people of the State, by providing public assistance to all of its needy and distressed, that assistance shall be administered promptly and humanely with due regard for the preservation of family life . . .' " 270 F. Supp. at 177.

With these purposes in mind the court considered the reasonableness of the one-year residence provision in relation to those purposes, holding,

> It is evident to us that as to these families living in Delaware for less than one year the denial of public assistance fails to carry out the stated purposes for the Public Assistance Code. It in fact tends to frustrate them. The residency requirement prevents prompt assistance to some of the State's needy and distressed and to that extent is the antithesis of "humane." It also necessarily results in pressure on the solidarity of the family unit. Nor given these circumstances is it an acceptable answer to say that until they are here one year such persons are not a part of the state's needy and distressed. The discrimination based on length of residency thus finds no constitutional justification in the purpose declared in the statute itself.

We have given first consideration to the above three-judge District Court cases because they are recent decisions on precisely the same subject and are not decisions of more remote application. We must be certain, however, that they comport with principles established by the Supreme Court. Although the Court has not dealt with this particular situation its decisions in other areas reveal the applicable principles, and to them we now turn.

In *McLaughlin* v. *Florida*, 379 U.S. 184, 191, our task in interpreting the Equal Protection Clause is stated as follows:

> The court must reach and determine the question whether the classifications drawn in a statute are reasonable in light of its purpose. . . .

Carrington v. *Rash*, 380 U.S. 89, 93, restated this test in exactly the same language.

In *Bates* v. *Little Rock*, 361 U.S. 516, 525, a case involving First Amendment rights of association, the Court declared that,

> When it is shown that state action threatens significantly to impinge upon constitutionally protected freedom it becomes the duty of this Court to determine whether the action bears a reasonable relationship to the achievement of the governmental purpose asserted as its justification.

In *Gulf, Colorado & Santa Fe Ry.* v. *Ellis*, 165 U.S. 150, 155 (1897), the power of classification was recognized as permitted by the Fourteenth Amendment, but the Court added that: "it is equally true that such classification cannot be made arbitrarily."

More specifically, in *Truax* v. *Raich*, 239 U.S. 33, 42 (1915), the Court stated that "reasonable classification implies action consistent with the legitimate interests of the State. . . ."

A principal purpose of Section 3-203 obviously is to provide public assistance to the needy. Moreover, the immediately preceding section provides that the entire public assistance chapter shall be administered so as to provide the maximum cooperation with other agencies rendering services in order "to maintain and strengthen family life and to help applicants for public assistance and recipients to attain self-support or self-care." D.C. Code § 3-202(b)(1) (1967). These purposes constitute the keystone of the legislation. A bona fide resident of the District of Columbia for six months who is indigent and without the means by which to support herself and her children is no less in need of public assistance than an indigent who has been here for a full year. The basic purposes of the legislation—public assistance to those in need, maintenance and strengthening of famiy life, achievement of self-support and self-care—are not more faithfully served by withholding aid until applicants have lived here for twelve months. Indeed, the denial of assistance for an entire year to otherwise qualified recipients may only erode values which the statute tries to promote. The spread over a year's time of the evils which public assistance seeks to combat may mean that aid, when it becomes available, will be too late: Too late to prevent the separation of a family into foster homes or Junior Villages; too late to heal sickness due to malnutrition or exposure; too late to help a boy from succumbing to crime.[8]

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[8] Recent studies have confirmed:

> Burglary, robbery, and serious assaults occur in areas characterized by low income, physical deterioration, dependency, racial and ethnic concentrations, broken homes, working mothers, low levels of education and vocational skill, high

Section 3-203 creates two classes of persons: those who have resided in the District of Columbia for one year or longer, and those who have resided here for less than one year. Although the Supreme Court has recognized that a "legislature is free to make classifications in the application of a statute which are relevant to the legislative purpose," it has emphasized that the "ultimate test of validity is not whether the classes differ but whether the differences between them are pertinent to the subject with respect to which the classification is made." *Asbury Hospital* v. *Cass County*, 326 U.S. 207, 214. If a six-month resident is denied the assistance given to a one-year resident, in circumstances in which each is otherwise within the requirements of the statute, the former is denied the equal protection of the law, for the clearly different treatment has no reasonable relation to the basic legislative purposes. The disqualifying requirement applicable to plaintiffs thus engrafts upon the legislation an invalid provision. The same reasons which led the courts in the *Thompson* and *Green* cases, and pendente lite in the *Smith* case, to hold comparable provisions invalid as classifications without a reasonable relation to the purposes of the legislation apply to our cases.

III

We consider now arguments which have been urged in support of the residence requirement.

It is said that Congress in gratuitously providing for assistance may not be held to constitutional standards. The decisions are to the contrary. In *Sherbert* v. *Verner*, 374 U.S. 398, 404, the Supreme Court held that the fact that "unemployment compensation benefits are not appellant's 'right' but merely a 'privilege'" does not save a statute limiting such rights from "consitutional infirm-

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unemployment, high proportions of single males, overcrowded and substandard housing, high rates of tuberculosis and infant mortality, low rates of home ownership or single family dwellings, mixed land use, and high population density. *President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society* 35 (1967).

ity."[9] There is no indication in our cases that Congress desired unequal protection of the laws. Congress viewed the eligibility provision as justified. Our judicial problem is to determine the reasonableness of the difference in treatment which the challenged requirement imposes upon those in need of public assistance. There is no escape from the proposition that, in carrying forward a comprehensive program of this character, restrictions having no reasonable relationship to the basic purposes of the program are not immune from attack because the Congress was not under legal obligation to inaugurate the program. The *Thompson*, *Green*, and *Smith* cases, to which we have referred in other respects, support this position.

Defendants also contend that the restriction is reasonable because it is designed to protect this jurisdiction from an influx of persons seeking more generous public assistance than might be available elsewhere. Congress made no finding to that effect. As we have seen,[10] the reason for the one-year residence requirement given in the Report of the Senate Committee was uniformity. Assuming, however, that Congress had in mind the protective purpose advanced by defendants, we are reminded that the historical origin of the localized character of public assistance was the Elizabethan Poor Laws.[11] These laws enshrined the notion of "settlement," from which the concept of residence descended. Only those who were settled there were entitled to receive relief from a community. No doubt due in large part to the influence of these English laws—perhaps a subconscious influence—a number of our state legislatures adopted the idea of a minimum period of residence as a prerequisite to eligibility. But the Supreme Court pointed out more than twenty-five years ago that

> the theory of the Elizabethan poor laws no longer fits the facts. Recent years, and particularly the past decade, have been marked by a growing recognition that in an industrial society the task of providing

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[9] See also Note, 73 Harv.L.Rev. 1595, 1599-1602 (1960).

[10] *Supra*, p. 5.

[11] The Poor Relief Act, 1601, 43 Eliz. 1, c. 2; The Poor Relief Act, 1662, 13 & 14 Car. 2, c. 12.

assistance to the needy has ceased to be local in character.

Edwards v. *California*, 314 U.S. 160, 174-75.

Another difficulty in accepting the protective assumption as giving constitutional support to the challenged provision, is the speculative character of the assumption from a factual standpoint. In 1956, the Deputy Commissioner of Social Welfare of the State of New York, which has not had a minimum period of residence for nearly a century, stated that in the preceding year only two per cent of all public assistance recipients had lived in New York for less than one year.[12] In 1963, the Moreland Commission on Public Welfare in New York, after a lengthy study of the entire fabric of public assistance, stated that it was opposed to residence requirements on the ground that "the present laws [designed to prevent abuse] are sufficient to protect the taxpayer without penalizing the unfortunate."[13] "To assume that people are influenced to move or not to move according to the availability of help on a relief basis is to misunderstand the dynamics of human behavior."[14] This is especially true in the United States. A committee of Congress has stated that "[g]eographical mobility has always been a habit of the American people."[15]

Even if some citizens do enter a state in order to obtain greater welfare aid, the possibility of this effect,

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[12] Kasius, *What Happens in a State Without Residence Requirements*, in Residence Laws: Road Block to Human Welfare 19-20 (1956).

[13] *State of New York, Moreland Commission on Welfare, Public Welfare in the State of New York* 27-28 (1963). See also Hyde, *The Trouble with Residence Laws*, 16 *Public Welfare* 103, 105 (1958).

[14] Kasius, note 12 *supra*, at 20. See also Moreland Commission Report, *supra* note 13, at 28: ". . . welfare aid is not a lure for people on the move, and . . . migration to states where living is attractive is high *despite* strict residence requirements." (Emphasis in original.)

[15] *House Select Comm. Investigating National Defense Migration, Analysis of Material Bearing on the Economic Social Aspects of the Case of Edwards* v. *California*, 77th Cong., 1st Sess. 2 (1941).

alone, is not in the circumstances sufficient to require the court to sustain the residence condition. As against a similar contention in the *Green* case, the court interposed the decision of the Supreme Court in *Edwards* v. *California*, *supra*, saying that such a ground was "a constitutionally impermissible basis for separate state treatment." The court continued:

> The protection of the public purse, no matter how worthy in the abstract, is not a permissible basis for differentiating between persons who otherwise possess the same status in their relationship to the State of Delaware.

Assuming that a provision to prevent abuse of the public assistance program would be valid—a case of abuse is not before us—the challenged provision sweeps before it all who have less than the required residence, including bona fide residents who had come to this jurisdiction for reasons disassociated entirely from a desire to obtain relief. This is too broad to be sustained in light of the resulting inequality of treatment:

> [A]ssuming, for the purpose of argument only, that the basic prohibition is constitutional, it does not follow that there is no constitutional limit to the means which may be used to enforce it.

Oyama v. *California*, 332 U.S. 633, 646-47; and see concurring opinion of Mr. Justice Brennan in *Trop* v. *Dulles*, 356 U.S. at 114, where he discussed the need of legislation to achieve desired ends by alternative methods open to less objection.

In *Thompson*, in language particularly applicable to our case, it is said:

> [I]f there were here a time limit applied equally to all, for the purpose of prevention of fraud, investigation of indigency or other reasonable administrative need, it would undoubtedly be valid. Connecticut's Commission of Welfare frankly testified that no residence requirement is needed for any of these purposes.

270 F. Supp. at 33.[16] And see *Green*, where the desire to avoid payments tainted with fraud or based on insufficient information, which the court said were of course legitimate ends, did not justify the one-year residence requirement, "particularly in view of the consequences to persons in need. . . ." 270 F. Supp. at 177. Whether or not a narrower provision designed to prevent abuse would be valid would of course depend upon its terms.[17]

The choice of twelve months denies plaintiffs the equal protection of the laws because, in a manner inconsistent with the basic purpose of the legislation, it bars them from assistance granted to others. That basic purpose, simply stated, is to aid members of the community who are in need. That the residence requirement serves other purposes—ease of administration, or discouragement of movement to the jurisdiction—does not help defendants when the consequence is to defeat the primary purpose of the legislation. Other means to accomplish secondary purposes must be sought. This is especially true when the discrimination perpetuates the conditions the legislation is designed to cure.[18]

It is also said by defendants that Congress in 42 U.S.C. § 602(b), where the basis for the federal contribution to state public assistance programs is set forth, has approved the one-year residence requirements of states. The fact is that Section 602(b) merely provides in this connection, that the Secretary of Health, Education and Welfare shall not approve any plan which denies aid on the basis of an eligibility requirement of more than a year.

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[16] Clearly administrative convenience is not in and of itself adequate support for infringement of a constitutional right. *Harman* v. *Forssenius*, 380 U.S. 528, 542; *Schneider* v. *Rusk*, 377 U.S. 163, 167.

[17] The reliance of defendants in this connection upon *People* v. *Lyons*, 374 Ill. 557, 30 N.E.2d 46 (1940), does not take into account the necessity of avoiding constitutional infringement by channeling the legislation so as to meet more directly the abuse sought to be avoided. Moreover, with great respect for the Illinois court, the more recent decisions of the federal courts to which we have referred are more in harmony with our views in this matter.

[18] See Moreland Commission Report, *supra* note 13, at 28: "Administratively, . . . the cost of investigating cases and enforcing residence laws costs more money than is saved."

As to the possibility that the legislature intended to confine assistance to domiciliaries of the jurisdiction and that the one-year residence provides an objective legislative test of such status, the *Green* court held:

> the one year residency requirement prevents many applicants from obtaining assistance even though they are clearly living in Delaware with an intention to remain indefinitely. . . .

The court left open the question "whether a state could constitutionally confine the benefits of its public assistance programs to its own domiciliaries." We also are not called upon to decide this question, for it is not disputed that the plaintiffs are bona fide domiciliaries of the District who came for reasons disassociated from the desire to obtain relief not elsewhere available.[19]

Finally, it is suggested that if the one-year residence provision is invalidated the whole program falls with it. We hold otherwise. No such result was held to follow in the *Thompson*, *Green* and *Smith* cases. It would not be reasonable to impute such an intention to Congress. Moreover, Section 203 is part of Chapter 2 of Title 3 of the Code, and Section 223 of the chapter conclusively demonstrates Congress entertained no such intention. Section 223 is explicit:

> If any provision of this chapter or the application thereof to any person or circumstance is held invalid, the remainder of the chapter and the application of such provision to other persons or circumstances shall not be affected thereby.

Views which support the validity of the one-year condition are well advanced by our dissenting brother, and by Judge Clarie, dissenting in *Thompson*. We readily acknowledge there is no absolute certainty about the reach of the Equal Protection Clause in this area of the law. "But the ordeal of judgment cannot be shirked." *Trop*

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[19] The regulation under which plaintiff Vera M. Barley was denied assistance, based on her residing in a public institution, falls with the reasoning of our decision applicable to the other plaintiffs, especially in light of the factual situation of plaintiff Barley as outlined in footnote 3, *supra*.

v. *Dulles*, *supra* at 104. We are encouraged to make the judgment we do not only by the decisions in *Thompson*, *Green* and *Smith*, but by the over-all salutary action of Congress in entering into the welfare programs of which Section 3-203 is a part. This national movement toward assistance where assistance is needed, and the human terms of the problem, permit the court somewhat greater latitude in deciding that this difference in the treatment of those in our midst who are in need amounts to unequal protection of the laws than if the treatment were with respect to some matter less critical to their living conditions.

An appropriate judgment will be entered based on our ruling that the one-year residence requirements of Section 3-203(a)(b) of our Code are invalid in application to plaintiffs and those in like circumstances. Counsel for the parties are requested to seek agreement on the form of judgment, taking into consideration any changes in the parties who are defendants due to reorganization of the Government of the District of Columbia.

/s/ DAVID L. BAZELON
Chief Circuit Judge

/s/ CHARLES FAHY
Senior Circuit Judge

Dated: November 2, 1967.

BAZELON, *Chief Judge*, concurring: I concur in Judge Fahy's opinion and would only emphasize that equal protection requires a statutory classification to be reasonably related to a "proper governmental objective," *Bolling* v. *Sharpe*, 347 U.S. 497 (1954), and that to deter indigents from settling in the District of Columbia is not such an objective, *Edwards* v. *California*, 314 U.S. 160 (1941).

* * * *

HOLTZOFF, District Judge, dissenting. I respectfully dissent from the conclusion of the majority that the Dis-

trict of Columbia statute prescribing a residence requirement of one year for eligibility for receiving public assistance is unconstitutional, as transgressing the Equal Protection of the Laws Clause of the Fourteenth Amendment, and as interfering with freedom of travel. In my opinion the enactment is a valid exercise of legislative power.

Each of the three consolidated actions now before the Court was instituted by an applicant for public assistance from the District of Columbia, whose request was denied by the local Welfare authorities, on the ground that she was ineligible because she had not been a resident of the District of Columbia for at least one year. In each instance, the plaintiff seeks a judgment setting aside the adverse action of the local Public Welfare authorities; requiring them to pass on the application for relief without regard to the residence requirement; and declaring the statutory provision imposing the residence requirement to be unconstitutional.

The District of Columbia statute involved in these cases is D.C. Code § 3-203, the pertinent provisions of which read as follows:

> § 3-203. *Eligibility for public assistance.*
>
> "Public assistance shall be awarded to or on behalf of any needy individual who either (a) has *resided in the District for one year immediately preceding the date of filing his application for such assistance;* or (b) who was born within one year immediately preceding the application for such aid, if the parent or other relative with whom the child is living has resided in the District for one year immediately preceding the birth; or (c) is otherwise within one of the categories of public assistance established by this chapter: . . ." [Emphasis supplied.]

The constitutionality of clauses (a) and (b) of the above statute is attacked in these actions.

In two of these cases the plaintiff is a mother with dependent children. The funds out of which public assistance for dependent children is disbursed by the States

(including the District of Columbia) are in part provided by the individual States and in part by a grant from the Federal Government, authorized by the Social Security Act, Subchapter IV, entitled, "Grants to States for Aid and Services to Needy Families with Children", 42 U.S.C. § 601 *et seq.* In order to be eligible for a Federal grant for this purpose, a State is required to submit a plan to the Secretary of Health, Education and Welfare, containing certain specified provisions, 42 U.S.C. § 602(a). Subsection (b) of that section contains the following requirement:

> "(b) The Secretary shall approve any plan which fulfills the conditions specified in subsection (a) of this section, except that he shall not approve any plan which imposes as a condition of eligibility for aid to families with dependent children, a residence requirement which denied aid with respect to any child residing in the State (1) who has resided in the State for one year immediately preceding the application for such aid, or (2) who was born within one year immediately preceding the application, if the parent or other relative with whom the child is living has resided in the State for one year immediately preceding the birth."

In other words, the Social Security Act expressly authorizes States receiving Federal grants for aid to dependent children, to impose residence requirements for eligibility for relief, with the limitation that such residence requirements shall not exceed one year. Consequently, insofar as aid to dependent children is concerned, the residence requirement enacted by the District of Columbia was expressly authorized by the Social Security Act, under which Federal grants are made to the States for that purpose. While the complaints in these actions do not expressly attack the validity of this provision of the Social Security Act, nevertheless, by necessary implication, a ruling that the District of Columbia statute is unconstitutional must also strike down in its wake the provision of the Social Security Act authorizing the enactment of such local requirements.

Statutes imposing specific residence prerequisites for receiving relief have been in existence in many States for a long time. They are not restricted to aid to dependent children, but in a broad scope are generally applicable to relief payments of all kinds. The usual residence requirement is one year. Without any attempt at making an exhaustive enumeration, a partial survey shows that the following States, among others, impose a residence requirement of at least one year as a qualification for receiving relief of any type: Maryland, West Virginia, North Carolina, South Carolina, Ohio, Illinois, Michigan, Wisconsin, Nebraska, Kansas, Texas, Colorado, Utah and Oregon. Virginia imposes such a condition for several types of relief. Such provisions are accepted as appropriate and prudent, if not indispensable, features of any system of administering relief to needy persons. The obvious purpose of such restrictions is to minimize the likelihood of imposition and abuses, even though at times they result in hardship to some individuals. The wisdom, policy, desirability, and expediency of such conditions are not within the purview of the judiciary, but must be determined by the legislature. The powers of Government are vested primarily in an elective Legislative body and an elective Executive. Were they to be shifted in whole or in part to the courts, composed of members holding office by permanent tenure, we would cease to have a popular form of government. An oligarchy would supplant it, no matter how benevolent.

If the conclusion of the majority is sound, the necessary consequence would be that all such local statutes must be deemed invalid and that no specific residence requirement may be constitutionally imposed by the States as eligibility for welfare payments. The relief systems of most of the States would have to be revamped, transformed, and reorganized.

While the number and nature of statutes relating to welfare legislation that would be rendered invalid under the ruling of the majority need not deter the courts from declaring all of them unconstitutional, if in fact they clearly transgress some constitutional limitation, nevertheless, the number and extent of such statutes and the

fact that they are an accepted feature of welfare legislation generally, should lead the court to pause. Doubts should be resolved in favor of validity, instead of upsetting all over the country well-established local plans for administering relief funds.

Members of the judiciary must not be influenced by their own views of the wisdom, expediency, or desirability of legislation, or by their own attitude toward charity. They must limit themselves to considering objectively and solely the constitutional power to enact the statute that is being challenged. As was said by Cardozo in *The Paradoxes of Legal Science*, "Legislature as well as court is an interpreter and a guardian of constitutional immunities." (p. 121).

While in determining justiciable cases and controversies brought before the Courts by persons having standing to sue, the courts in case of a conflict between an applicable statute and a pertinent constitutional provision, must have recourse to the Constitution as the supreme law of the land and ignore the statute, thereby adjudging the statute to be unconstitutional, the power to render such a decision must be exercised with caution, circumspection and deliberation. Statutes may not be lightly set aside by the judiciary on the theory that they contravene some constitutional limitation. It is a basic principle that there is a strong presumption of constitutionality as to every legislative enactment. This presumption must be clearly overcome before a statute may be declared invalid. The presumption of validity is not a mere form, but a potent rule that must be actively applied by the courts. Again, as was said by Cardozo,[1] "The presumption of validity should be more than a pious formula, to be sanctimoniously repeated at the opening of an opinion and forgotten at the end."

Chief Justice Marshall developed and expounded the doctrine that if in a justiciable controversy instituted by a party having standing to sue, it is determined that an applicable statute is in conflict with the Constitution the issues should be determined in accordance with the Con-

[1] The Paradoxes of Legal Science, p. 125.

stitution and the statute declared invalid, *Marbury* v. *Madison*, 1 Cranch. 137. He, nevertheless, called for caution in the exercise of this prerogative and announced that it should be exerted only if the conviction of incompatibility was clear and strong. He said in *Fletcher* v. *Peck*, 6 Cranch. 87, 128:

> "The question, whether a law be void for its repugnancy to the constitution, is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative, in a doubtful case. The court, when impelled by duty to render such a judgment, would be unworthy of its station, could it be unmindful of the solemn obligations which that station imposes. But it is not on slight implication and vague conjecture, that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other."

He reiterated this doctrine in *Brown* v. *Maryland*, 12 Wheat. 419, 436:

> "It has been truly said, that the presumption is in favor of every legislative act, and that the whole burden of proof lies on him who denies it constitutionality."

Chief Justice Waite summarized the same principle in the following manner, *Sinking-Fund Cases*, 99 U.S. 700, 718:

> "It is our duty, when required in the regular course of judicial proceedings, to declare an act of Congress void if not within the legislative power of the United States; but this declaration should never be made except in a clear case. Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government cannot encroach on the domain of another without dan-

ger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule."

Coming down to our own times, Mr. Justice Stone in *Hardware Dealers Mutual Fire Insurance Co.* v. *Glidden Co. et al.*, 284 U.S. 151, 158, emphasized that when legislation deals with a subject that is within the scope of legislative power, "the presumption of constitutionality is to be indulged."

In *United States* v. *National Dairy Corp.*, 372 U.S. 32, Mr. Justice Clark referred to the principle that a strong presumptive validity attaches to an Act of Congress.

Cases enunciating and applying this doctrine are legion. The following are a few of them: *Dartmouth College* v. *Woodward*, 4 Wheat. 518, 625; *Legal Tender Cases*, 12 Wall. 457, 531; *Munn* v. *Illinois*, 94 U.S. 113, 123; *United States* v. *Harris*, 106 U.S. 629, 635; *Close* v. *Glenwood Cemetery*, 107 U.S. 466, 475; *Atchison, Topeka & Santa Fe R.R.* v. *Matthews*, 174 U.S. 96, 104; *Middleton* v. *Texas Power & Light Co.*, 249 U.S. 152, 157; *O'Gorman & Young, Inc.* v. *Hartford Fire Ins. Co.*, 282 U.S. 251, 257-258.

The principles that the Supreme Court formulated as a guide primarily for itself in deciding constitutional questions are *a fortiori* binding and controlling on District Courts and Courts of Appeals. From the early years of the Republic and through the first half of the Nineteenth Century, the Supreme Court consistently and rigidly adhered to these doctrines in passing upon the validity of legislative enactments. Thus, between 1790 and 1860 only two Acts of Congress were declared unconstitutional by the Supreme Court.[2] One of them, which was stricken down in *Marbury* v. *Madison*, 1 Cranch. 137, was a provision of the Judicial Code of minor importance relating to the jurisdiction of the Supreme Court.

A shift in the attitude toward the validity of legislative measures began after the Civil War and the subsequent enactment of the Fourteenth Amendment. From time to

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[2] Robert H. Jackson, *The Struggle for Judicial Supremacy*, p. 40.

time legislation in the social and economic field was held invalid as repugnant to the Due Process Clause or the Equal Protection Clause of the Fourteenth Amendment. These provisions were deemed to enact into the Constitution the right of freedom of contract and the privilege of using one's property without governmental interference. During the decade beginning in 1920, the number of Acts of Congress declared invalid rose to a high point.[3] Almost invariably these decisions were reached against emphatic protests contained in dissenting opinions of members of the Court who were in the minority, but who have been regarded as enlightened, progressive and far-sighted. Their dissenting opinions form part of the classics of our constitutional history and constitutional law.

In *Lochner* v. *New York*, 198 U.S. 45, in which a statute regulating the hours of labor in a bakery was held invalid as interfering with the freedom of contract, Mr. Justice Holmes wrote a forceful dissenting opinion, which has been often quoted and which is worthy of repetition. He said (p. 75):

> "This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of the majority to embody their opinions in law. It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious or if you like as tyrannical as this, and which equally with this interfere with the liberty to contract. . . . *The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics.*" [Emphasis supplied.]

Mr. Justice Holmes again spoke out emphatically in protest against the decision of the majority in *Hammer*

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[3] Robert H. Jackson, *Id.* p. 40.

v. *Dagenhart*, 247 U.S. 251, in which the Supreme Court invalidated an Act of Congress prohibiting transportation in interstate commerce of goods manufactured in a factory employing child labor. In his dissenting opinion, Mr. Justice Holmes said, in part (p. 280):

> "I had thought that the propriety of the exercise of a power admitted to exist in some cases was for the consideration of Congress alone and that this Court always had disavowed the right to intrude its judgment upon questions of policy or morals. It is not for this Court to pronounce when prohibition is necessary to regulation if it ever may be necessary. . . ."

During that era there were numerous expressions in dissenting opinions of a similar tenor culminating in the celebrated dissenting opinion of Mr. Justice Stone in *United States* v. *Butler*, 297 U.S. 1, in which the Court held the Agricultural Adjustment Act to be unconstitutional. His ringing words deserve frequent reiteration. He said, in part (pp. 78-79, 87):

> "The power of courts to declare a statute unconstitutional is subject to two guiding principles of decision which ought never to be absent from judicial consciousness. One is that *courts are concerned only with the power to enact statutes, not with their wisdom.* The other is that while unconstitutional exercise of power by the executive and legislative branches of the government is subject to judicial restraint, the only check upon our own exercise of power is *our own sense of self-restraint.*"
>
> * * * *
>
> "*Courts are not the only agency of government that must be assumed to have capacity to govern.*" [Emphasis supplied.]

The minority in many of these cases intimated from time to time that the majority were unconsciously influenced by their own personal predilections in social and economic matters. The situation became of sufficient moment for two Presidents of the United States to register protests in different ways. President Theodore Roosevelt sug-

gested one remedy, and President Franklin D. Roosevelt recommended another.[4] As a matter of coincidence at about the time when the proposal of President Franklin Roosevelt was defeated in Congress, the Supreme Court seemed to reverse its attitude, going as far as overruling some of the prior decisions to which reference has been made, *West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379, in which Mr. Chief Justice Hughes wrote the prevailing opinion. A new era in American constitutional history arrived. The tendency of the Supreme Court to annul social welfare legislation, which had prevailed for several decades was drastically ended, and was supplanted by a more progressive trend. It is to be hoped that the pendulum will not swing back and inaugurate another cycle when it may be said that personal social and economic predilections of judges unconsciously influence decisions on constitutionality of legislation,—even though the predictions may be dicerent.

In my opinion the statutory provision challenged in these cases is clearly a valid exercise of legislative power. Relief and welfare payments by the Government are grants. They are not the payment of legal obligations. The legislative branch of the Government in providing grants has a right to select objects for which and the persons to whom they shall be made. That it chooses to make grants to members of one group does not mean that it is under an obligation to make similar grants to members of another group, even though the second group may be similar to the first and equally worthy. *A fortiori* the fact that Congress has authorized grants to be made to members of one group, does not empower the courts to extend them to members of the second group.

Even in connection with meeting legal and moral obligations, the Congress may make distinctions between objects and persons. For example, by the Federal Tort Claims Act the Congress waived the soverign immunity of the

[4] For interesting accounts by two active participants in the controversy involved in the proposals of President Franklin D. Roosevelt, see Robert H. Jackson, *The Struggle for Judicial Supremacy*, pp. 177 et seq.; and Burton K. Wheeler, *Yankee from the West*, pp. 319 *et seq.*

United States to suit in tort. It excepted, however, certain specified torts. Surely, it would not be contended that the exceptions are invalid and that, therefore, the immunity should extend to torts in the excepted list. So, too, certain groups of persons, such as Government employees, have been held to be outside of the scope of the Federal Tort Claims Act. Surely, it cannot be contended that these exceptions are likewise invalid and that, therefore, by judicial construction Government employees are entitled to the benefits of the Federal Tort Claims Act.

No basis for invalidity is discernible in a limitation of grants or welfare and relief funds to residents of the State. In fact, the majority opinion so concedes. The legislature, however, is not compelled to leave the matter of determining whether a particular person is or is not a resident to administrative officials. Such a course would be administratively inefficient, ponderous and slow, as well as expensive. No reason is perceived why Congress may not provide a simple formula for distinguishing permanent residents of the State from other persons who happen to be sojourning in it at any one time. Residence for one year is such a test. There are numerous rights and privileges that are conferred on residents of a State but which are denied to other persons within its boundaries. An outstanding example is the residence requirement for voters, imposing a specified length of residence within the State. Certain occupations are at times limited to residents. Numerous examples may be cited.

A somewhat similar question arose in *Flemming* v. *Nestor*, 363 U.S. 603. The Social Security Act contains a provision cutting off old age insurance benefits and disability insurance benefits from any person who has been deported from the United States on any one of specified grounds, 42 U.S.C. § 402(n)(1). The validity of this provision was challenged in that case. The Supreme Court upheld the constitutionality of this Section, even though it related to benefits of a contributory insurance scheme to which the insured had made periodic payment, instead of consisting of mere grants, as is the case here. In discussing this question the Supreme Court wrote as follows (p. 611):

> "In judging the permissibility of the cut-off provision of [§ 402(n)] . . . from this standpoint, it is not within our authority to determine whether the Congressional judgment expressed in that section is sound or equitable, or whether it comports well or ill with the purposes of the Act. 'Whether wisdom or unwisdom resides in the scheme of benefits set forth in Title II, it is not for us to say. The answer to such inquiries must come from Congress, not the courts. Our concern here, as often, is with power not with wisdom.' . . . Particularly when we deal with a withholding of a noncontractual benefit under a social welfare program such as this, we must recognize that the Due Process Clause can be thought to interpose a bar only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification."

As concerns the Equal Protection of the Laws Clause of the Fourteenth Amendment, it needs no citation of authorities to establish that reasonable classifications are not a violation of that constitutional provision. Admittedly, it is reasonable to differentiate between residents and non-residents for the purpose of making relief payments. The one-year requirement is a simple method of distinguishing between the two groups. The Legislature does not have to adopt a ponderous system of taking evidence as to each applicant to determine whether the applicant is a *bona fide* resident of the State. As heretofore stated, such a method of administration might well bog down the whole relief system in delays, expenses and frustration. Legislatures may have valid reasons for limiting relief payments to residents of the State for a specific minimum period. Whether we would approve the same course as a matter of policy and expediency is immaterial. The manifest purpose of the legislation is to prevent a particular State or District from becoming a Mecca for migrants from other States where relief payments are smaller. This is a reasonable and legitimate purpose.

A survey of relief payments in some of the neighboring States, as compared with those made in the District of Columbia, clearly demonstrates the reason for the possible

fear of the District of Columbia that it might be confronted with an invasion of prospective applicants for relief from other States, if it were not for the residence qualification. For example, during the fiscal year ending June 30, 1967, the average monthly grant of aid to dependent children in the District of Columbia for a family was $168.08; in Virginia, it was $123.59; in Maryland, it was $163.22; in West Virginia, only $98.14; in North Carolina, it was $24.24 per person. The average grant of old age assistance in the District of Columbia was $67.20, as compared with $60.29 in Maryland; $48.16 in West Virginia; and $58.06 in North Carolina. The average monthly grant of aid to disabled was $81.72 in the District of Columbia, as compared with $75.57 in Maryland; $77.82 in Virginia; $45.77 in West Virginia; and $64.36 in North Carolina.

The second infirmity found in the statute by the majority opinion is that the limitation interferes with freedom of travel. The right to travel throughout the realm is concededly one of the privileges and immunities of a citizen of the United States. Clearly the District of Columbia or any one of the States, would be without power to block the entrance of any person residing within the United States, or in any way directly to interfere with travel between the States. The existence of this right does not bar the Congress, however, from imposing a tax on railroad, airline or bus tickets and thereby making travel more costly. It does not constitute an invalid interference with the right of travel from State to State, or from any State to the District of Columbia, to impose residence requirements for voters, or for the pursuit of specified occupations. The same reasoning applies to residence requirements for eligibility to relief payments.

The decision in *Edwards* v. *California*, 314 U.S. 160, 174 is clearly distinguishable. The statute held invalid in that case made it a criminal offense to bring in or assist in bringing in to the State any indigent person who was not a resident of the State. This enactment created a direct interference with the right of travel. The opinion of the Supreme Court pointed out clearly that all that was being determined was the propriety of an attempt

by a State to prohibit transportation of indigent nonresidents and the question of relief to newcomers was not involved. At page 174, the Court stated:

> ". . . we are not now called upon to determine anything other than the propriety of an attempt by a State to prohibit the transportation of indigent nonresidents into its territory. The nature and extent of its obligation to afford relief to newcomers is not here involved."

There is another and very important aspect to the subject under discussion. If the exclusion of persons who have not resided in the jurisdiction for at least one year is stricken down, the entire relief plan falls. This is not a case where one provision of the statute is so disconnected from the balance that the rest can stand even if the one provision be held invalid. Here the residence requirement is part of the scheme enacted by the Congress. If it is held that the Congress may not provide for welfare payments of one kind or another without including persons who have sojourned in the jurisdiction for less than one year, it does not follow that if the exclusion is annulled payment may be made to those persons whom Congress has expressly excluded. If the Congress passes an Act making grants to members of Group A and the Court holds that Congress may not constitutionally do so without extending the benefits to members of Group B, the result is that the entire scheme becomes invalid. The Courts may not accord the benefits of the Act to members of Group B by practically amending the statute. Congress may well say that if we cannot limit our grants to members of Group A, no grants shall be made at all if we must include members of Group B. In other words, the subject must go back to Congress, and the entire statute dealing with public assistance, D.C. Code § 3:201-223 must be deemed invalid.

Mr. Justice Brandeis in *Dorchy* v. *Kansas*, 264 U.S. 286, 290, a case that has often been cited as authoritative, summarized the governing principle as follows:

> "But a provision, inherently unobjectionable, cannot be deemed separable unless it appears both that,

> standing alone, legal effect can be given to it and that the legislature intended the provision to stand, in case others included in the act and held bad should fall."

The fact that the statute contains a severability clause is not decisive. It merely shifts the burden of proof from the plaintiff to the defendant on the question whether the balance of the statute can remain operative if one part is excised as invalid.

In *Hill* v. *Walace*, 259 U.S. 44, 71, the Court stated:

> ". . . undoubtedly such a provision furnishes assurance to courts that they may properly sustain separate sections or provisions of a partly invalid act without hesitation or doubt as to whether they would have been adopted, even if the legislature had been advised of the invalidity of part. *But it does not give the court power to amend the act.*" [Emphasis supplied.]

In this instance if the exclusion of persons who have not resided in the jurisdiction for at least one year, is stricken down with the intention that this group should receive the benefit of the Act, the majority of the Court would be amending the Act and expanding its scope. The exclusion is part of the warp and woof of the statute and not a separable clause.

In *Railroad Retirement Board* v. *Alton Railroad Co.*, 295 U.S. 330, 362, the Court discussed the effect of a severability clause as follows:

> "Such a declaration provides a rule which may aid in determining the legislative intent, but is not an inexorable command. *Dorchy* v. *Kansas*, 264 U.S. 286. It has the effect of reversing the presumption which would otherwise be indulged, of an intent that unless the act operates as an entirety it shall be wholly ineffective. . . . But notwithstanding the presumption in favor of divisibility which arises from the legislative declaration, we cannot rewrite a statute and give it an effect altogether different from that sought by the measure viewed as a whole."

In *Carter* v. *Carter Coal Co.*, 298 U.S. 238, 313, the Court succinctly summarized this doctrine and the effect of the severability clause as follows:

> "The statutory aid to construction in no way alters the rule that in order to hold one part of a statute unconstitutional and uphold another part as separable, they must not be mutually dependent upon one another."

The conclusion is inescapable that if the Court strikes down the provision of the public assistance statute of the District of Columbia limiting the benefits of the Act to needy individuals who have resided in the District of Columbia for at least one year, the entire statute is nullified, because Congress did not legislate to make grants to any one who does not meet the eligibility requirement; and if this qualification is annulled, the entire Act falls. The Court may not by construction extend the provisions of the Act to persons not included in it. The only remedy would be new legislation.

I am not unmindful of the fact that a similar residence requirement in Delaware has been recently held unconstitutional by a three-judge District Court, *Green* v. *Department of Public Welfare*, 270 F. Supp. 173; and likewise that a Connecticut statute that is somewhat akin to that involved here was held unconstitutional in *Thompson* v. *Shapiro*, 270 F. Supp. 331, by a vote of two to one. With due deference and respect for these two courts, the decisions do not seem persuasive. In the Connecticut case Judge Clarie's dissenting opinion is more convincing than the majority view. Moreover, the Connecticut statute is quite different from the customary residence requirement. It excludes from the benefits of the welfare statute any person who comes into the State without visible means for support and applies for aid within one year after arrival. It is not a provision basing eligibility on residence alone. Neither the Delaware case, nor the Connecticut decision, consider the question of severability and whether striking down the residence requirement would invalidate the entire statutory scheme. Apparently that point did not come to the attention of either Court.

The Social Security Act is a comprehensive, far-reaching, progressive statute of epochal social and economic significance. It was framed on the basis of detailed studies by Committees created by the President. It was thoroughly and carefully considered by the Congress and its Committees. The legislation was the fruit of long and thorough studies and scrutiny on the part of numerous persons. The statute introduced social insurance into the United States on a large scale. Its beneficent contributory plans for compulsory old age insurance and for unemployment insurance accorded permanent economic security and independence to millions of persons who had lived in dread as to what was to become of them in old age or in case of loss of employment for a lengthy period. The public assistance features of the legislation, such as aid to dependent children, which is involved in this legislation, were created as auxiliaries to the insurance schemes. The basic constitutionality of the Act was sustained by the Supreme Court in the leading case of *Helvering* v. *Davis*, 301 U.S. 619. No feature of the statute has been invalidated until the present time.

If the decision of the majority stands, the provisions for aid to dependent children will be thrown into confusion and possibly destroyed. The entire District of Columbia legislation for public assistance likewise becomes a nullity. Such an outcome must be regretted.

ALEXANDER HOLTZOFF
United States District Judge.

October 17, 1967.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1497-67

MINNIE HARRELL, ET AL., PLAINTIFFS
CLAY MAE LEGRANT, PLAINTIFF-INTERVENOR

v.

WALTER E. WASHINGTON, ET AL., DEFENDANTS

Civil Action No. 1579-67

VERA M. BARLEY, ET AL., PLAINTIFFS

v.

WALTER E. WASHINGTON, ET AL., DEFENDANTS

Civil Action No. 1749-67

GLORIA JEAN BROWN, ET AL., PLAINTIFFS
CLAY MAE LEGRANT, PLAINTIFF-INTERVENOR

v.

WALTER E. WASHINGTON, ET AL., DEFENDANTS

DECREE

This Court having declared that Sections 3-203 (a) and (b), District of Columbia Code, (1967 ed.) are unconstitutional and having further declared that District of Columbia Department of Public Welfare Handbook of Public Assistance, EL 9.I, III, B, 3, is unconstitutional, it is

ORDERED, ADJUDGED, AND DECREED, that the defendants Walter E. Washington, as Commissioner of the District of Columbia, Winifred G. Thompson, as Director of the Department of Public Welfare of the District of Columbia, Donald G. Gray, as Chief of the Public

Assistance Division, Department of Public Welfare of the District of Columbia, Undine Wilson, as Chief, Intake Service Unit, Public Assistance Division, Department of Public Welfare for the District of Columbia, their agents, officers, employees and successors in office, be and each is hereby permanently enjoined:

1. From enforcing or giving any legal effect to the provisions of Sections 3-203(a) and (b), District of Columbia Code, (1967 ed.);

2. From enforcing or giving any legal effect to such provisions of EL 9.I of the District of Columbia Department of Public Welfare Handbook of Public Assistance which implement Sections 3-203(a) and (b), District of Columbia Code (1967 ed.) by requiring as a condition for applying for or obtaining Aid to Families with Dependent Children, Aid to the Blind, Aid to the Permanently and Totally Disabled, or General Public Assistance, that a resident of the District of Columbia reside in the District of Columbia for a period of one year;

3. From refusing to process any application for Aid to Families with Dependent Children, Aid to the Blind, Aid to the Permanently and Totally Disabled, or General Public Assistance made to the District of Columbia Department of Public Welfare or in any way denying public assistance in any of the forementioned categories of aid to any resident of the District of Columbia solely for the reason that such person has not resided in the District of Columbia for a period of one year.

The requests of plaintiffs for further relief are denied, as unnecessary, since it is assumed that the defendants will fully and in good faith comply with this decree.

November 28, 1967

/s/ David L. Bazelon
Chief Circuit Judge

/s/ Charles Fahy
Senior Circuit Judge

I dissent.

/s/ Alexander Holtzoff
United States District Judge

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APPENDIX

In the Supreme Court of the United States

October Term, 1967
No. 34

ROGER A. REYNOLDS, MAYER I. BLUM, HERBERT R. CAIN, JR., KATHERINE M. KALLICK, ROSALIE KLEIN, ALFRED J. LAUPHEIMER, EDWARD O'MALLEY, JR., NORMAN SILVERMAN, JULIA L. RUBEL, Constituting the Philadelphia County Board of Assistance, WILLIAM P. SAILER, Its Executive Director; MAX D. ROSENN, Secretary of the Department of Public Welfare of the Commonwealth of Pennsylvania; WILLIAM C. SENNETT, Attorney General of the Commonwealth of Pennsylvania,
Appellants

v.

JUANITA SMITH, Individually, and by Her, Her Minor Children, JOHN SMITH, TABITHA MILLER, SOPHIA PAYNTER, WILLIAM PAYNTER, VONCELL PAYNTER, and on Behalf of All Others Similarly Situated
and
JOSE FOSTER, Individually, and by Her, Her Minor Children, JEANETTE FOSTER, ANNIE BEA FOSTER, WILLIAM FOSTER, FRANCES FOSTER,
Appellees

On Appeal from the United States District Court for the Eastern District of Pennsylvania.

Appeal Docketed February 21, 1968
Probable Jurisdiction Noted March 4, 1968

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APPELLANTS' APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

No. 42419 Civil Action

Juanita Smith, individually, and by her, her minor children, John Smith, Tabitha Miller, Sophia Paynter, William Paynter, Voncell Paynter, on behalf of themselves and all others similarly situated,

Plaintiffs

v.

Roger A. Reynolds, Mayer I. Blum, Herbert R. Cain, Jr., Katherine M. Kallick, Rosalie Klein, Alfred J. Laupheimer, Edward O'Malley, Jr., Norman Silverman, Julia L. Rubel, constituting the Philadelphia County Board of Assistance, William P. Sailer, its Executive Director, Max D. Rosenn, Secretary of the Department of Public Welfare of the Commonwealth of Pennsylvania, William C. Sennett, Attorney General of the Commonwealth of Pennsylvania,

Defendants

I.

RELEVANT DOCKET ENTRIES

1967

3-31, Petition to proceed in forma pauperis and Order granting same filed.

3-31, Motion to convene a three judge court and complaint filed.

4-21, Answer filed.

5-5, Transcript of hearing 5-3-67 filed.

5-10, Defendants' memorandum of law filed.

5-29, Motion of plaintiff re Class action—Order to be entered.

5-31, Motion and Order that this action be maintained as a class action filed.

6-1, Findings of fact, discussion and conclusions of law.

6-1, Decree that defendants are preliminarily enjoined from enforcing Sections 9 (a) and 9 (d) of the Act of June 24, 1937, P.L. 2051 as amended and from withholding relief benefits from plaintiffs.

7-7, Transcript of hearing of May 29, 1967 filed.

11-9, Motion of Jose Foster, individually, and by her, her minor children, Jeanette Foster, Annie Bea Foster, William Foster and Frances Foster, to intervene as plaintiffs.

11-14, Order granting leave to intervene.

12-18, Opinion and Decree that defendants are permanently enjoined from enforcing the Public Welfare Code residence requirement.

1968

1-2, Notice of appeal of defendants to The Supreme Court of the United States.

In the United States District Court for the Eastern District of Pennsylvania

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(Title Omitted in Printing)

II.

COMPLAINT

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1. The jurisdiction of this Court is invoked under Title 28, U.S.C. Sec. 1343, 42 U.S.C. Sec. 1983, 28 U.S.C. Secs. 2281, 2284, and 28 U.S.C. Secs. 2201, 2202, this being an action for declaratory judgment and preliminary and permanent injunction to redress the deprivation under color of state law of rights, privileges and immunities secured to plaintiffs by the United States Constitution.

2. The plaintiffs are:

(a) Juanita Smith, an expectant mother, and her minor children, John, Tabitha, Sophia, William and Voncell, citizens of the United States and residents of the Commonwealth of Pennsylvania with their place of residence at 2859 Amber Street, Philadelphia, Pennsylvania;

(b) All other persons, citizens of the United States and residents of the Commonwealth of Pennsylvania, who would be entitled to public assistance except that they have not resided in Pennsylvania during the immediately preceding one year.

3. Juanita Smith, John Smith, Tabitha Miller, Sophia Paynter, William Paynter and Voncell Paynter fairly and adequately represent the class of Pennsylvania residents described in Paragraph 2 (b) above, on whose behalf they sue, and the persons constituting said class are so numerous as to make it impractical to bring them all before this Court.

4. The defendants are:

(a) Roger A. Reynolds, Mayer I. Blum, Herbert R. Cain, Jr., Katherine M. Kallick, Rosalie Klein, Alfred J. Laupheimer, Edward O'Malley, Jr., Norman Silverman and Julia A. Rubel, who comprise the Philadelphia County Board of Assistance, and are duly appointed and qualified members of the said Board and citizens of the Commonwealth of Pennsylvania;

(b) William P. Sailer, Executive Director of said Board and a citizen of the Commonwealth of Pennsylvania;

(c) Max D. Rosenn, Secretary of Public Welfare of the Commonwealth of Pennsylvania and a citizen thereof;

(d) William C. Sennett, Attorney General of the Commonwealth of Pennsylvania and a citizen thereof.

The foregoing public officers are charged, under the Public Assistance Law of the Commonwealth of Pennsylvania, with the enforcement, operation and execution of the provisions thereof. The County Board of Assistance and its Executive Director are particularly charged with the administration of public assistance and determination of the eligibility of applicants and the continued eligibility of persons re-

ceiving assistance in accordance with said law. The Public Assistance Law of the Commonwealth of Pennsylvania was enacted on June 24, 1937, P. L. 2051, Sec. 1 et seq., 62 Purd. Stat. Sec. 2501 et seq. The relevant provisions of the said Act, as amended, are attached hereto as Exhibit A.

5. The Act of June 24, 1937, P. L. 2501, Secs. 9 (a) (2) and 9 (d), as amended, 62 Purd. Stat. Sec. 2508.1 (6) provides that assistance shall be granted only to or in behalf of a resident of Pennsylvania who has resided therein for at least one year immediately preceding the date of application.

6. Plaintiffs have resided at 2859 Amber Street, Philadelphia, Pennsylvania since the second week of December, 1966, when they came to Pennsylvania from Lincoln, Delaware, and intend to reside permanently in the Commonwealth of Pennsylvania.

7. Plaintiff Juanita Smith's paternal and maternal grandparents were born and raised, worked and owned houses in Philadelphia. Plaintiff's father and mother were born and raised and presently reside in Philadelphia.

8. Plaintiff was born March 8, 1943 in the Army Hospital at Petersburg, Virginia, where her father was stationed, and at one month she returned with her mother to Philadelphia.

9. Plaintiff resided continuously in Philadelphia but for several months until 1959 and attended public schools here.

10. From 1959 to December last, plaintiff lived and worked in Delaware.

11. Plaintiff returned with her children to Philadelphia in December, 1966 to rejoin her family, seeking better education and health care and job opportunities for her children and herself and attempting to escape the vestiges of segregation.

12. Plaintiff's rent through February, 1967 and her expenses were borne by her father but in January, 1967 he was laid off from his job and has since been unemployed.

13. Plaintiff's mother is similarly unemployed and is sickly.

14. On February 20, 1967, plaintiffs made application for public assistance and that day received a grant of $115.00.

15. A second grant in the same amount was received two weeks later on March 10, 1967.

16. On March 13, 1967, plaintiff Juanita Smith was informed by the County Board of Assistance that assistance to her and her children would be terminated. A copy of the formal notice of termination is attached hereto as Exhibit B.

17. Assistance to plaintiffs was terminated solely because they did not satisfy the statutory requirement of one year's residence immediately preceding their application.

18. Plaintiff Juanita Smith, without any source of income, faces a $63.00 gas bill for heating her house, rent due April 1, 1967, and the continuing necessity of caring for her children and maintaining herself. Plaintiffs are in immediate and irrevocable need of

public assistance and but for the residence requirement are fully entitled to receive it. Plaintiffs are suffering and will suffer immediate and irreparable injury from termination of public assistance.

19. The Act of June 24, 1937, P. L. 2501, Secs. 9 (a) (2) and 9 (d), as amended, 62 Purd. Stat. Sec. 2508.1 (6) requiring as a condition of public assistance that plaintiffs reside in Pennsylvania for one year immediately preceding application is contrary to the United States Constitution in that,

(a) the purpose of said Act is to exclude indigent citizens from the Commonwealth which purpose is impermissible and repugnant under the privileges and immunities clause of the Fourteenth Amendment, the equal protection and due process clauses thereof and under the commerce clause, Article I, Section 8 of the Constitution;

(b) said Act burdens, penalizes and obstructs the exercise by citizens of the United States of the right freely to move from state to state, a right of national citizenship secured by the privileges and immunities clause of the Fourteenth Amendment;

(c) said Act burdens, penalizes and obstructs the free movement of persons from state to state, contrary to the commerce clause, Article I, Section 8 of the Constitution;

(d) said Act arbitrarily and unreasonably discriminates between citizens of the United States, nonresidents of the Commonwealth, hindering the movement into the Commonwealth only of those citizens who are poor, an invidious discrimination in viola-

tion of the equal protection clause of the Fourteenth Amendment;

(e) said Act unreasonably denies citizens of other states privileges and immunities accorded citizens of the Commonwealth, contrary to Art. IV, Section 2 of the Constitution;

(f) said Act arbitrarily and unreasonably discriminates between residents of the Commonwealth, citizens thereof, denying assistance to those not continuously resident in the Commonwealth during the immediately preceding one year while granting assistance to all others, an invidious discrimination in violation of the equal protection clause of the Fourteenth Amendment;

(g) public assistance, established to provide for all of the needy and distressed in the Commonwealth, is arbitrarily and unreasonably withheld by said Act from Pennsylvania residents not continuously resident in the Commonwealth during the immediately preceding one year, depriving plaintiffs of due process guaranteed by the Fourteenth Amendment.

Wherefore, plaintiffs respectfully pray that:

1. The Court convene a three-judge District Court as required by Title 28, U.S.C. Secs. 2281 and 2284.

2. The Court declare the Act of June 24, 1937, P. L. 2501, Secs. 9 (a) (2) and 9 (d), as amended, 62 Purd. Stat. Sec. 2508.1 (6) and any enforcement thereof unconstitutional.

3. The Court preliminarily enjoin and, after full hearing, permanently enjoin defendants from en-

forcing the Act of June 24, 1937, P. L. 2501, Secs. 9 (a) (2) and 9 (d), as amended, 62 Purd. Stat. Sec. 2508.1 (6).

4. The Court grant such further relief as shall be necessary and proper.

Respectfully submitted,

By (s) Thomas K. Gilhool
Consumer's Advocate

Community Legal Services, Inc.
313 South Juniper Street
Philadelphia, Penna.
Attorney for Plaintiffs

(Jurat omitted in printing)

In the United States District Court for
the Eastern District of Pennsylvania

(Title Omitted in Printing)

III.

MOTION

Pursuant to Title 28, U.S.C. Sec. 2284 (3) and Rule 65 (b), Fed. R. Civil P. and based upon the verified complaint herein, attached affidavits and certification of counsel, plaintiffs move the court for a temporary restraining order restraining defendants from failure to continue public assistance to plaintiffs.

The grounds in support of this motion are as follows:

1. Defendants, members of the County Board of Assistance and its Executive Director, having made public assistance payments to plaintiffs Juanita Smith and her five minor children on February 20, 1967 and March 10, 1967 each in the amount of $115.00, now propose to cease such payments.

2. Such termination is solely because plaintiffs had not resided in Pennsylvania for the one year immediately preceding their application and is under contest in the above titled action.

3. Unless restrained defendants will not continue public assistance to plaintiffs and plaintiffs, Juanita

Smith and her five minor children, left destitute and without income to support and maintain themselves, will suffer immediate and irreparable injury.

4. If this temporary restraining order be granted the injury, if any, to defendants herein, if final judgment be in their favor, will be inconsiderable.

Respectfully submitted,

(s) Thomas K. Gilhool
Consumer's Advocate

Community Legal Services, Inc.
313 South Juniper Street
Philadelphia, Penna.
Attorney for Plaintiffs

AFFIDAVIT

Commonwealth of Pennsylvania
County of Philadelphia, ss:

Juanita Smith, being first duly sworn, on oath, deposes and says:

1. That she is plaintiff in the present action and the mother of five children, by her, plaintiffs in the present action.

2. That since receipt of the $115.00 public assistance payment on March 10, 1967, she and her family have had no income, but for certain small amounts in temporary charity from the Traveler's Aid Society of Philadelphia.

3. That such amounts include $2.00 for carfare on March 27, 1967, a small food order and the promise of money to meet her rent due April 1, 1967.

4. That she is entirely without money or any source of money to pay a back gas bill of $63.00 due March 24, 1967; in default her heat will be turned off.

5. That she is without money or any source of money adequately to maintain her children and herself in health and at a minimal standard of subsistence.

6. That she has been refused medical care by Episcopal Hospital for her pregnancy and her children because she is not receiving public assistance.

7. That she and her children are suffering and will suffer immediate and irreparable injury from the failure of the County Board of Assistance to continue public assistance.

(s) Juanita Smith

Sworn to and subscribed before me this 31st day of March, 1967.

(s) Rosetta S. Frank
Notary Public

AFFIDAVIT

Commonwealth of Pennsylvania
County of Philadelphia, ss:

Catherine M. Kerner, being duly sworn according to law, on oath, deposes and says:

1. That she is Executive Director of the Travelers Aid Society of Philadelphia and that as such she is personally acquainted with the actions of the Society with regard to Juanita Smith and her five children.

2. That the Society cannot and will not pay Juanita Smith's back bills, including by way of example, the $63.00 gas bill for heating her house.

3. That the Society will meet the rent due of Juanita Smith on April 1, 1967 and will meet certain expenses as they arise including some provision for food.

4. That the Society's aid is both temporary and insufficient to maintain the family.

5. That the Society's aid is offered gratuitously as a charity to continue only pending the Society's determination as to whether it is best for the family to remain here or not, and if the Society's decision is negative the aid will continue only until an alternate plan, for example return to Delaware, can be arranged.

(s) Catherine M. Kerner

Sworn to and subscribed before me this 31st day of March, 1967.

(s) Rosetta S. Frank
Notary Public

(Affidavit of service omitted in printing)

In the United States District Court for the Eastern District of Pennsylvania

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(Title Omitted in Printing)

IV.

ORDER

Whereas, in the above titled action it appears by verified complaint and affidavits that a temporary restraining order preliminary to hearing upon motion for a preliminary injunction should issue, without notice because immediate and irreparable injury, loss and damage will result to plaintiffs Juanita Smith and her five minor children before notice can be served and a hearing had thereon, in that defendants will not continue public assistance to plaintiffs and will leave plaintiffs destitute and without income to support and maintain themselves.

Notice and a hearing before entering a temporary restraining order should not be required because time and the immediate jeopardy of plaintiffs do not permit such a hearing.

Now, therefore, on motion of the plaintiffs,

It is ordered that defendants, each of them, their agents, servants and employees, and all persons acting by, through or under them or either of them or

by or through their order be, and they are hereby, restrained from failing to continue public assistance to plaintiffs Juanita Smith and her five minor children.

Issued at ..... o'clock ..m. this day of March, 1967.

(s) Joseph S. Lord, III.
District Judge

Motion denied 3-31-67.

In the United States District Court for the Eastern District of Pennsylvania

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(Title Omitted in Printing)

V.

ANSWER

First Defense

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1. The defendant admits that the Public Assistance Law of the Commonwealth of Pennsylvania, the Act of June 24, 1937, P. L. 2051, by Section 8.1, added by the Act of August 26, 1965, P. L. 389, 62 Purdon's Penna. Statutes Annotated, Section 2508.1, provides, inter alia, for a one year period of residence as an eligibility requirement for public assistance benefits.

2. Defendants admit that Max Rosenn, Secretary of Public Welfare, has final responsibility for the administration of the public assistance laws of the Commonwealth of Pennsylvania, and that in the administration of said laws the said residence requirement is enforced.

3. Defendants admit the allegations contained in paragraphs 1, 2(a), 4(c), 5, 14, 15, 16 and 17 of the complaint; allege that they are without knowledge or information sufficient to form a belief as to the

truth of the allegations contained in paragraphs 6, 7, 8, 9, 10, 11, 12, 13 and 18 of the complaint; and deny each and every other allegation contained in the complaint.

Second Defense

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1. Defendants deny that the residence requirements for public assistance eligibility deprive plaintiffs of any of the rights secured by the Constitution of the United States, as alleged in paragraph 19 of the complaint and, accordingly, aver that the complaint fails to state a claim against defendants upon which relief can be granted.

Edgar R. Casper
Deputy Attorney General

Edward Friedman
Counsel General

William C. Sennett
Attorney General
Attorneys for Defendants

Office of the Attorney General
Room 238, State Capitol Building
Harrisburg, Pennsylvania 17120

(Affidavit of service omitted in printing)

In the United States District Court for
the Eastern District of Pennsylvania

(Title Omitted in Printing)

VI.

HEARING SUR PLAINTIFFS' MOTION
FOR PRELIMINARY INJUNCTION
MAY 3, 1967

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(3) MR. GILHOOL: May it please the Court, I am Thomas Gilhool. I represent the plaintiffs in the action pending before Your Honors.

We are here this morning on plaintiffs' motion pursuant to Rule 65 for a preliminary injunction.

I should like initially to call the Court's attention to the admissions in defendants' answer to Paragraphs 14, 15, 16 and 17, as alleged in the complaint, and in particular to that allegation that assistance to plaintiffs at Paragraph 17—

JUDGE LORD: Excuse me. Just a minute.

MR. GILHOOL: Surely.

JUDGE LORD: Which paragraphs? 14, 15—

MR. GILHOOL: 14, 15, 16 and 17, among others, were admitted. These were most pertinent, particu-

larly Paragraph 17, wherein the Commonwealth and other defendants here admit that:

> "Assistance to plaintiffs was terminated solely because they did not satisfy the statutory requirement of one year's residence immediately preceding their application."

JUDGE KALODNER: There is no doubt about it. The single question here is one of law, isn't it? It is a question that this particular person is disqualified or not (4) qualified to receive unemployment relief because she lacks qualification.

MR. GILHOOL: I quite agree, that is the question; there is a large question of that—

JUDGE KALODNER: It is the single question.

MR. GILHOOL: Yes, sir.

JUDGE LORD: You say there is a violation of various constitutional provisions.

MR. GILHOOL: I am here this morning on preliminary injunction and I should like to present evidence to the Court as to irreparable harm and the other matters that concern the Court in the present posture of the case.

I should have in a moment a memorandum of law to hand up to Your Honors and should be pleased to present testimony on that point.

JUDGE KALODNER: Do you think you need that testimony in light of the fact this woman was on relief for two months and the relief was only stopped because she failed to meet the one year residence requirement?

MR. GILHOOL: Your Honor, I am satisfied to omit the testimony, if Your Honor thinks it appropriate.

The testimony I would offer would be offered to prove that the assistance that plaintiffs have received from Travelers Aid since late March when public assistance (5) had been discontinued and the moneys therefrom had expired is itself about to be terminated.

If Your Honors think that question is germane I should be pleased to proceed to proof.

JUDGE LORD: I wonder if that couldn't be stipulated?

MR. CASPER: Your Honors, I am not quite sure what kind of testimony Mr. Gilhool is willing to put in.

JUDGE KALODNER: Ask him.

MR. CASPER: Very well, but I would like to say this: If he is willing to put in, for example, somebody from Travelers Aid, if he is trying to show that Travelers Aid will give no assistance or very little if public assistance is discontinued, I am sure I could stipulate to that, but on the other hand my question is that doesn't necessarily constitute irreparable harm.

In other words, I don't think this is relevant testimony.

JUDGE LORD: Well, that is another question. It is up to us to decide whether it constitutes irreparable harm.

All we are asking you to do in order to shorten this is to stipulate the facts.

MR. CASPER: Your Honor, I am willing to (6) stipulate to facts that are in the affidavit of the lady from Travelers Aid.

MR. GILHOOL: That affidavit, Your Honors, was executed on March 31 and therefore the particular facts as stated there are rather changed.

Travelers Aid assistance has proceeded from the end of March to the present date. Travelers Aid has notified plaintiffs that they can continue assistance no longer than a week from now.

The ground of that notification is inherent in the nature and the purpose of Travelers Aid. They offer temporary relief pending the completion of an analysis of a case and a judgment on their part as to whether continued assistance is either possible or appropriate within the limits of their budget.

In this case, Your Honors, Travelers Aid has had sufficient time to secure the appropriate information from the state from which plaintiffs here come. Their judgment therefore is that since she is or would be eligible for public assistance in Delaware, Travelers Aid Society of Philadelphia cannot and will not continue assistance.

Plaintiffs are therefore faced with the choice of remaining here with no income on which to maintain themselves, or returning to Delaware and thenceforth forfeiting (7) the very rights they are claiming under this action.

JUDGE KALODNER: Why can't you stipulate to that?

MR. CASPER: I can stipulate to that, Your Honor.

MR. GILHOOL: There is one other matter that would have been the subject of proof and that is plaintiff's previous contacts with Pennsylvania; the fact that her parents were born here and reside here; that her grandparents lived, worked here in this state; that plaintiff herself, Juanita Smith, while not born in Pennsylvania did return with her mother to Pennsylvania at the end of one month and was raised here in Pennsylvania, attended schools here, and in 1959, having finished the ninth grade at Harding Junior High School, removed to Delaware and did not return until last December.

Is there a stipulation as to that?

MR. CASPER: I would be willing to stipulate to that, Your Honors.

JUDGE KALODNER: All right.

MR. GILHOOL: If Your Honor please, may I submit my brief?

JUDGE LORD: Is there any reason why we couldn't treat this as if on final hearing?

MR. GILHOOL: Not from my perspective, except (8) for the urgency of relief for plaintiff in this matter.

JUDGE LORD: Well, I would think that we could decide this just as quickly as if on final hearing as we could on preliminary injunction.

MR. CASPER: Except for this, Your Honors. I understood Mr. Gilhool's intent to be—

JUDGE KALODNER: Just a minute. I can't hear you. With the whir of this air conditioner I can't hear you.

MR. CASPER: I understood it was Mr. Gilhool's intention to confine his argument today to the proposition that whatever the merits on the constitutional question, if this lady were not to be paid public assistance she would suffer irreparable harm and therefore would ask your Court for a preliminary injunction pending final disposition of the case.

MR. GILHOOL: It was my intention certainly to confine my evidence to that question.

JUDGE KALODNER: But you have to establish a right.

MR. GILHOOL: As Your Honor suggests there is no question but that this action raises a serious constitutional challenge to Section 816.

JUDGE KALODNER: There is no question in your mind.

(9) MR. GILHOOL: Well, I perhaps suggest, Your Honor, even that there is no question in your mind so far as preliminary injunction is concerned.

I am prepared, however, to go beyond that today.

JUDGE KALODNER: If you gentlemen want to agree—you haven't answered Judge Lord's question.

Do you want to treat this as if on final hearing?

MR. CASPER: How would Your Honors propose to proceed as if on final hearing; with briefs to be filed after any argument we might wish to make today?

JUDGE LORD: Certainly, you can do that.

MR. CASPER: Yes, I am merely saying that because I thought again the original understanding was that here are plaintiffs and they are coming in challenging an old law and saying this is unconstitutional.

We felt we could sit back, as it were, and say go ahead, prove it, and see their briefs and look at their argument and their authorities in detail before we took any kind of a firm position. Now, of course—

JUDGE KALODNER: You were acquainted with their contentions set forth in the complaint. Why did you need briefs in order to prepare?

(10) MR. CASPER: I think, Your Honor, there is somewhat of a difference between a contention—the complaint is like a kitchen sink complaint on the United States Constitution; the privileges and immunities clause, the due process clause, the commerce clause; I am sure that—

JUDGE KALODNER: You were acquainted with the fact that those were the bases of their contentions.

MR. CASPER: Yes, but the question of what argument—

JUDGE KALODNER: You have no brief then?

MR. CASPER: We have no brief, no. We have not received a brief from Mr. Gilhool either.

JUDGE KALODNER: What is your name, sir?

MR. CASPER: Edgar Casper.

JUDGE KALODNER: You are a deputy attorney general?

MR. CASPER: Yes, sir. I would be agreeable, Your Honors, if it suits you and Mr. Gilhool, to proceed on this basis, to get into the question of the merits as long as first of all we are not restricted with respect to our rights of responding to a brief that plaintiff puts in.

JUDGE LORD: Let me ask you this, Mr. Casper. Are you, for example, familiar with, have you read and have you analyzed Edwards against California?

(11) MR. CASPER: Yes.

THE COURT: You are familiar with that?

MR. CASPER: Yes.

THE COURT: You are familiar with it, and I suspect, Mr. Gilhool, that is the thrust of your argument, isn't it?

MR. GILHOOL: Yes, sir. That is one of the thrusts of the argument.

The other, sir, among two additional points to be made, derive from Kent versus Dulles, Aptheker versus United States, and United States versus Guest; i.e., that the right to travel freely from state to state is a liberty to be exercised by plaintiffs here, that being established in light of Sherbert versus Verner.

The Commonwealth in this statute has conditioned the receipt of public assistance upon the surrender of

that liberty and as Sherbert holds, such a condition is unconstitutional.

Beyond that, Your Honor—

MR. CASPER: If I may say, Your Honors, I think you will find the argument, in whatever way it progresses, is going to raise complications in terms of analogical reasoning because the cases that plaintiffs rely on are somewhat removed from the actual context of this case.

(12) MR. GILHOOL: Are we proceeding to argument, Mr. Casper?

MR. CASPER: No, I was merely trying to define—forgive me, help clarify the problem presently before the Court as to how to proceed at this point.

JUDGE KALODNER: You are not prepared to go forward on an agreement?

MR. GILHOOL: Your Honors—

JUDGE LORD: Then we will hear you on preliminary injunction.

MR. GILHOOL: As to that, Your Honor, I understand we have on the record stipulations which go to the facts that I desire to prove today.

JUDGE LORD: Yes, you have a stipulation.

MR. CASPER: Yes.

JUDGE LORD: That the Travelers Aid which is the only aid that she is getting, is that correct, is about to terminate in the very near future.

Well, can you say when?

JUDGE SHERIDAN: You did tell us.

MR. GILHOOL: Yes, in a week.

JUDGE LORD: One week.

MR. GILHOOL: Yes, Your Honor.

JUDGE LORD: And that she has no other means of (13) subsistence.

MR. GILHOOL: Yes.

MR. CASPER: I did not—was not willing to stipulate to that, Your Honors.

JUDGE LORD: All right, you are not willing to stipulate to that.

MR. CASPER: No.

JUDGE LORD: Do you want to put your plaintiff on the stand?

MR. CASPER: I would like to say, for example, that there was nothing in the complaint, the motion, anything that I have seen that has been submitted by plaintiff that suggests, for example, that the City of Philadelphia was approached with respect to support of plaintiff under the Philadelphia Child Welfare Program. I have seen nothing so far. I have heard nothing about this.

JUDGE LORD: All right, you are entitled to hear it.

MR. GILHOOL: Your Honor, there are certain matters I should like to ask you to take judicial notice of.

One goes directly to the point just raised by Mr. Casper. I should like to ask the Court to take judicial notice of the Administrative Code of Pennsylvania governing the Philadelphia Child Welfare Program; that is the City of (14) Philadelphia Child Welfare Program referred to by Mr. Casper. That statute is to be found in 71 Purdon's Statute, 600, therein setting out the powers and responsibilities of the Department with respect to Child Welfare.

JUDGE KALODNER: What section?

MR. GILHOOL: 600. The Legislature has provided that such assistance shall be granted without regard to residence.

Your Honor, we have in the juxtaposition of that statute and the statute before the Court a considerable anomaly.

Child Welfare and the City's powers to expend money therefor and the Department's purpose in standing behind that arrangement provide that children who are in need or who are dependent or neglected may be placed in foster homes and the cost of their care will be borne by the State, incidentally, at a rate something like four times the assistance granted to those receiving aid to dependent children where the children are in their homes, so plaintiff is faced with the extraordinary fact that she cannot retain her children in her home and receive assistance.

If she is to receive assistance for those children she must part with those children and place them in foster care.

(15) A lengthy dissertation, Your Honor, on one statute—

JUDGE KALODNER: Is this woman married? I notice she has three sets of children, as it were. It doesn't say anything about her husband.

MR. GILHOOL: No, sir. She is not married.

Mr. Paynter, who is the father of the three youngest children, came to Pennsylvania with plaintiff.

I should like to proceed to that matter in testimony, if Your Honor please.

JUDGE KALODNER: All right.

MR. GILHOOL: Miss Smith.

JUANITA SMITH, sworn.

Direct Examination

BY MR. GILHOOL:

Q. Miss Smith, would you state for the Court your name and address?

A. Juanita Smith. I live at 2859 Amber Street.

Q. In Philadelphia?

A. Yes, in Philadelphia.

Q. Have you any children?

A. Yes, I have five and one on the way.

(16) Q. What are their names and ages?

A. Johnny Smith; he is six. Tabitha Miller; she is four. Sophia Paynter; she is three. William Paynter; he is a year and a half, and Voncell Paynter, she is nine months.

Q. How long have you lived at 2859 Amber Street?

A. Since the second week in December.

JUDGE KALODNER: Will you ask her to keep her voice up?

BY MR. GILHOOL:

Q. Miss Smith, can you keep your voice up?

JUDGE KALODNER: There is a whirl of an air conditioning machine above you.

MR. GILHOOL: Modern technology sometimes interferes.

BY MR. GILHOOL:

Q. Where did you live immediately before you came to Pennsylvania in December?

A. I lived in Lincoln, Delaware.

Q. And who did you live with there?

A. William Paynter. He is the father of my three —you know, the three smallest children and the father of the one I am going to have in September.

Q. Where were you born, Miss Smith?

A. Petersburg, Virginia.

(17) Q. And what previous connection have you had with Pennsylvania?

A. Well, I—well, my mother came back when I was a baby, I was a month old, and I went to school —went to a lot of schools up here.

BY JUDGE LORD:

Q. You went to what?

A. Schools, different schools up here, and I went back to Delaware in '59.

BY MR. GILHOOL:

Q. In 1959?

A. Yes.

Q. Will you describe the circumstances in which you lived in Delaware?

JUDGE KALODNER: Why don't we find out about the father of the other two children?

MR. GILHOOL: Your Honor, I think that matter irrelevant to the legal questions at stake here.

JUDGE KALODNER: We ought to have the facts about the father of the other children here; can they be sued for support?

You are talking about irreparable injury. There is a provision in the State law that she can get support from the father of those children by court order, isn't there?

(18) MR. GILHOOL: Yes, sir.

JUDGE KALODNER: All right, when you speak of irreparable injury you haven't considered apparently the fact that she can recover for it or she can receive support for these children by application and action of the State Court, in the Municipal Court, or the County Court, as it is now called.

MR. GILHOOL: Yes, sir, assuming the defendants in those actions can be located and the action can proceed expeditiously.

JUDGE KALODNER: Suppose the father of the other children can support them. That would have some bearing here.

BY MR. GILHOOL:

Q. Miss Smith, are you aware of—do you know where the father of John Smith is?

A. He is in Delaware. I had sued him when I was there and I had also sued James Miller, Tabitha's father, but they couldn't find either one of them at that time and I haven't heard anything from them.

Q. And you are presently unaware of their whereabouts?

A. I don't know where they are.

JUDGE KALODNER: The same holds true with the father—

(19) BY JUDGE KALODNER:

Q. You have a child, John Smith. You just told us you were never married, were you?

A. No.

Q. All right, you don't know where John Smith—where the father of John Smith is?

A. He was in Delaware and I had sued him.

BY MR. GILHOOL:

Q. When was that, Miss Smith?

A. About two years ago.

BY JUDGE LORD:

Q. Do you know where he is now?

A. No, I don't.

BY JUDGE KALODNER:

Q. Did you receive any support from him as a result of the suit?

A. No, I haven't heard anything from him at all.

Q. You said you sued him in Delaware. What happened?

MR. GILHOOL: Your Honor, I think Miss Smith testified that he was unable to be located.

BY MR. GILHOOL:

Q. Is that right?

A. Yes, and James Miller, Tabitha's father, was somewhere in Baltimore but they couldn't locate him.

(20) BY JUDGE LORD:

Q. Do you know where he is now?

A. No.

Q. How about the father of Sophia?

BY MR. GILHOOL:

Q. Mr. Paynter; where is Mr. Paynter at the moment?

A. Well, Mrs. Enty, when I was on public assistance, heard—she had heard he was in Delaware with his father. I have written to him four times but I received no answer.

Q. Do you know if Mr. Paynter is employed in Delaware?

A. Mrs. Haimowitz in Travelers Aid, she said he was unemployed.

Q. I wonder if you would tell the Court what Mr. Paynter's previous employment had been.

A. Well, in Lincoln he was working at the Shawnee Country Club. It is a seasonal job.

In the summertime he averaged $50 a week, you know, before they took everything out, but in the wintertime sometimes he came home with $21, sometimes less, but it wasn't enough to get along with.

Q. Would you describe further your circumstances in Delaware prior to your coming to Pennsylvania last December?

A. Well, my father came to visit us in December and we were staying in a trailer. It had two bedrooms, a kitchen, living (21) room, but no bathroom. We had to go to Milford to get water. That was about three miles.

Q. You had to go to Milford to get water?

A. Yes.

Q. You had no running water?

A. No, and we didn't have any electric, which we were using oil lamps. The closest school was a mile and a half.

Q. Did you work in Delaware?

A. Yes, I had to work in the wintertime because he didn't make too much.

BY JUDGE KALODNER:

Q. What kind of work did you do?

A. I worked at Draper Canning Company. It is a —you know, processes vegetables.

BY MR. GILHOOL:

Q. Why did you and William Paynter with your children decide to come to Philadelphia in December?

A. Well, I had wanted to come up here but when my father came down he saw the conditions which we were living under.

He said why—at that time he was working at United Parcel and he said that he could, you know, help us get a house and get the electric and stuff cut on until William could get a job, but when Mr. Paynter came up here he couldn't find a job so he went back to Delaware.

(22) Q. What were your reasons for coming beyond the job for Mr. Paynter?

A. Well, you could get better jobs up here than you can there and I did want to go back to school because I never went past the ninth grade and Mr. Paynter, he never finished the fourth grade.

BY JUDGE KALODNER:

Q. How old are you?

A. I am 24.

Q. 24?

A. Yes.

Q. Have you gone back to school since you were here?

A. No.

Q. Have you made any attempt to go back to school?

A. No, I can't leave the children alone. I don't have any babysitter.

JUDGE KALODNER: Did you get the ages of the children?

MR. GILHOOL: They are in the record, Your Honor.

BY JUDGE SHERIDAN:

Q. Did I understand you to say you are having another child?

A. Yes, in September.

(23) BY MR. GILHOOL:

Q. Mr. Paynter's child?

A. Yes.

Q. When you were in Delaware did you consider taking up a licensed practical nursing course?

A. I did, but, well, not in Wilmington but in the part where I was—see, I was down there at Milford Hospital, you know, down in Lincoln and Milton.

Well, down there if you are colored you can't—If I had took up nurse's aid I couldn't get a job as a nurse in Milford Hospital.

Q. Why is that?

A. Well, they just don't have any colored nurses in there. I mean I could get a job in the kitchen, you know, or cleaning up, but not as a nurse's aid. I would have to go to Wilmington.

Q. Did you have any relatives here in Philadelphia?

A. Yes, my father's brothers and sisters, they were all born and raised here. They are all here, and my mother's sisters and brothers.

Q. When did you apply for public assistance?

A. I think it was in February, about the 22nd, I think. I am not sure of the date.

Q. Between the time when you arrived in December and (24) February, how had you managed?

A. Well, my father, like I said before, he was helping us with the bills and stuff. He had paid the rent up until March 1st but he got laid off January 7th

Q. What support responsibilities does your father have for his own family?

A. He has a wife and six kids.

BY JUDGE KALODNER:

Q. Who has a wife and six kids?

A. My father.

BY MR. GILHOOL:

Q. You applied for public assistance late in February. Was it granted?

A. Yes.

Q. How many payments did you receive?

A. I received two checks.

Q. And in what amount was each payment?

A. $115.

Q. When was public assistance terminated?

JUDGE LORD: That is in the complaint.

MR. GILHOOL: Yes.

A. In March.

JUDGE KALODNER: You have an exhibit that sets that forth.

(25) MR. GILHOOL: Yes, sir.

MR. CASPER: That is admitted.

MR. GILHOOL: Right.

JUDGE KALODNER: That is admitted. It was terminated because of the failure to meet the eligibility requirements.

BY MR. GILHOOL:

Q. How have you managed since public assistance was terminated?

A. Travelers Aid has been helping me with my bills.

Q. And what amounts of money has Travelers Aid provided for the maintenance of yourself and the children?

A. Well, when Travelers Aid started helping me they said they could only help, you know, with the bills of the present time for the month.

BY JUDGE KALODNER:

Q. You were asked how much money they were giving you a week.

A. Well, I mean they pay my bills, like the rent.

BY MR. GILHOOL:

Q. Do they give you a weekly payment?

A. No.

Q. How do they pay you?

A. Like my rent is due the first of the month and she will (26) give me a check to pay, you know, half of it.

Q. Is that check sent to you through the mail?

A. No, I go there and get it.

Q. Where is the Travelers Aid office?

A. At 30th Street Station.

JUDGE KALODNER: How much is that check that she gets cashed?

BY MR. GILHOOL:

Q. How much is your rent?

A. My rent is $50 a month.

MR. GILHOOL: Your Honor, Travelers Aid assistance comes seriatim, ad hoc, so the rent would be a check for $50. $25 would be toward the rent.

BY JUDGE KALODNER:

Q. They give you $25 a month toward your rent. What else do they give you?

MR. GILHOOL: Food.

BY JUDGE KALODNER:

Q. What else?

A. I get food stamps and she gives me the $6 to go with the order for that and she is taking care of my electric and gas.

BY MR. GILHOOL:

Q. Has Travelers Aid covered all of your outstanding bills?

(27) A. No, because like I said they can only pay the part, where they were helping me. The past of the bills, it is up to me to pay that.

Q. You have some back bills?

A. Yes.

Q. What are they?

A. Well, my gas bill is—it was $81.

(28) BY JUDGE LORD:

Q. $81?

A. Yes.

Q. For how long?

A. Part from December.

Q. From December?

A. Yes.

Q. It is still a big gas bill.

A. We have gas heat.

Q. You have gas heat?

A. Yes, and the two houses on each side are empty.

BY MR. GILHOOL:

Q. That bill is still outstanding?

A. Yes.

Q. Have you had any other source of income since public assistance terminated besides Travelers Aid?

A. No.

Q. How long will Travelers Aid continue?

JUDGE KALODNER: Is she in a position to tell us that?

MR. GILHOOL: Yes, sir. I think so. She has been informed how long it will continue by Travelers Aid.

JUDGE KALODNER: She can tell us what she was (29) informed. They may well change their minds.

A. She said another week, another week.

Q. When did she tell you that?

A. When I saw her yesterday.

BY JUDGE LORD:

Q. When you saw her yesterday?

A. Yes.

JUDGE KALODNER: Do you have anyone here from Travelers Aid?

MR. GILHOOL: Yes, sir.

JUDGE KALODNER: All right.

MR. GILHOOL: I have no further questions. Mr. Casper?

Cross-Examination

BY MR. CASPER:

Q. Miss Smith, when your father was laid off from work and you found yourself with this monetary problem, what did you do?

A. Well, I didn't know what to do and I had to go by the school that day because my little boy needs glasses and the nurse had sent for me.

BY JUDGE LORD:

Q. Your boy what?

A. He needs glasses.

(30) Q. Yes.

A. And the nurse had sent for me, so she told me I had to take him to Jefferson, so I told her I had

been cut off from DPA and I didn't have no way to get any, so she sent me to the Anti-Poverty place, 23rd, Frankford and Allegheny, and they sent me to my lawyer, you know from the Travelers Aid.

BY MR. CASPER:

Q. If I may interrupt you, I don't think you quite understood my question, Miss Smith.

When there was first a problem you applied for public assistance and you got two payments; is that correct?

A. Yes.

JUDGE SHERIDAN: Excuse me one moment.

JUDGE KALODNER: I have difficulty hearing the witness. I have difficulty hearing you too for that matter. There is a whirr of this air-conditioning above here.

JUDGE LORD: Can we turn that off? I think if we turned it off in here it would turn it off in every other courtroom.

All right, let's try that.

JUDGE SHERIDAN: There is no excuse for a lawyer not being heard.

(31) BY JUDGE KALODNER:

Q. You want me to hear you, don't you?

A. Yes, sir.

BY MR. CASPER:

Q. My question was this, Miss Smith. You applied for public assistance and I understand you received two payments, two checks?

A. Yes.

Q. You were then told that this assistance would be discontinued?

BY JUDGE LORD:

Q. Is that right?

A. Yes.

JUDGE KALODNER: There is no doubt about it. There was a letter of March 28 from the Public Assistance Board notifying her, because she didn't meet the one-year residence eligibility requirement, that unemployment relief would be discontinued. There is no question about it.

MR. CASPER: Your Honor, my question is when confronted with that situation what did she do?

JUDGE KALODNER: Ask her that. Don't ask whether she received notice.

MR. CASPER: No, Your Honor. She misunderstood my question.

(32) BY JUDGE LORD:

Q. When you got that notice what did you do? When you knew you weren't going to get any more public assistance, what did you do?

A. I went up to the Anti-Poverty place at 23rd Frankford and Allegheny, to find out if I could get any help there. They sent me to my lawyer and I explained everything to him and he sent me to Travelers Aid.

BY JUDGE KALODNER:

Q. Who is your lawyer?

A. Mr. Gilhool.

JUDGE KALODNER: All right.

BY MR. CASPER:

Q. Tell me whether I am correct. Do I understand you correctly, that you are relying on Mr. Gilhool with respect to the question of what resources may be available to you?

A. Yes.

Q. You never went to the City Department of Public Welfare and consulted with them and their social workers?

A. Well, Miss Enty had already told me that I was cut off because of residence.

Q. That is not my question. The City Department of Welfare, not the County Board of Assistance, the Philadelphia City Department of Public Welfare and its social service program; (33) you have never been there?

It is very simple. If you don't know anything about them just tell me.

A. No, I don't.

MR. CASPER: Thank you very much. I have no further questions.

MR. GILHOOL: That's all, thank you.

(Witness excused.)

REBA HAIMOWITZ, sworn.

Direct Examination

BY MR. GILHOOL:

Q. Miss Haimowitz, what is your occupation?

A. I am a case worker at Travelers Aid Society of Philadelphia.

Q. How long have you been there?

A. I have been there two years now.

Q. What is the purpose of the agency?

A. Travelers Aid is set up primarily by Community Chest of Philadelphia to assist newcomers to the city.

Q. And how does it assist them?

A. Our assistance can be in the form of a brief period of financial assistance, but essentially we are concerned about the plans of the people; whether settling in the new community (34) is desirable as contrasted to their purpose for leaving the other community.

Q. Do you act as a referral agency as among other agenies in the city as well?

A. Many times.

Q. Have you had an association with Juanita Smith?

A. Yes.

Q. What has that association been?

A. Miss Smith was referred to us by the Anti-Poverty Program for assistance because of the discontinuance of her public assistance grant and we accepted her as a client.

Q. What assistance have you given Miss Smith and her family?

A. So far it has totalled about $174 in the time—

Q. That is over what period of time?

A. Since—

Q. Can you recollect what period of time?

JUDGE KALODNER: She is looking at her records.

A. Toward the end of March, about the 25th.

Q. What has this assistance been for?

A. The items primarily covered were transportation since there were clinic visits as well as to us, rent, food, supplementing the stamp program since that is not sufficient for the half-month period, clothing, laundry, soap, various household expenses.

(35) Q. What need or expenses have you not been able to assist with?

A. We do not cover back bills, essentially.

Q. What do you do with respect to medical matters?

A. We try to find a way of getting free medical care if it exists and if a person needs medical care and it is not free we will provide it. We will pay for it.

Q. How long will you continue assistance to Juanita Smith and her family?

A. Since we have gone pretty deeply into the plan, we feel we cannot continue longer than a week or so.

Q. Would you say why it is that you have reached that decision at this time?

A. At this point under the circumstances it would seem that a return to Delaware would be indicated.

Q. And why is that?

A. Because she cannot get assistance here and there is no other plan for maintenance here in the city.

Q. You are not prepared to continue to maintain her through the year?

A. We are not set up for that.

Q. Have you informed Miss Smith of this?

A. Yes.

Q. When did you do so?

(36) A. Yesterday, and also in my home visit last Thursday.

Q. Upon the termination of your assistance and in the absence of public assistance what resources to maintain Juanita Smith and her family are available?

A. Almost none. Her father evidently cannot or will not give any more, I don't know. Her mother cannot assist too much.

Q. Essentially the conclusion of your plan was that it is best she return to Delaware?

You said the understanding was that she could not receive assistance here?

A. Yes.

MR. GILHOOL: I have no further questions.

Cross-Examination

BY MR. CASPER:

Q. I am not sure I understood you. Is it correct that if Miss Smith were to return to Delaware she would be eligible for assistance there?

A. In Delaware she is a resident of Delaware.

Q. Let me ask you this. Have you explored other possibilities of plans that could be worked out if Miss Smith were to remain here, stay here in Pennsylvania?

A. Are you referring to the City Department of Welfare?

Q. That is only one possibility. I am asking you. You are (37) an expert in the field.

A. We are essentially the only agency set up for newcomers and nonresidents.

Q. Well, let's start with the city department. What did you explore?

A. That is primarily an institutional agency and Miss Smith is interested in keeping her family with her.

BY JUDGE LORD:

Q. What is an institutional agency?

A. The Department of Welfare; that is, it is primarily for placement.

Q. In foster homes?

A. Yes, not a method of enabling a mother to stay with her children.

JUDGE LORD: All right.

BY MR. CASPER:

Q. First of all, foster home care, that is not institutional?

A. Right.

Q. But foster home care isn't like an adoption, is it?

A. No.

Q. It may be a temporary matter?

A. Right.

Q. It may help somebody over some rough spots?

A. Yes.

(38) Q. So you can develop a plan?

A. Yes.

Q. And then the mother might get together with the children again?

A. Right.

Q. Did you discuss this case of Juanita Smith?

A. I considered it but I did not discuss it because the problem would still remain of free medical.

Q. What is the problem of medical care?

A. Not being a resident, not receiving assistance, she cannot be helped under the maternal and infant program.

BY JUDGE KALODNER:

Q. Whose program is that?

A. It is a federal program given to different hospitals here and—except it covers a specific area for each hospital.

Q. Does that also have a residence requirement?

A. No, but unfortunately she lives outside of that area of residence for Episcopal Hospital.

BY JUDGE LORD:

Q. Doesn't she live in that area?

A. She is ineligible for Temple and any other hospital and Frankford does not have a program.

BY MR. CASPER:

Q. I am sorry, I don't understand you. I am familiar with (39) the fact that the medical assistance program does not have a residence requirement.

I don't understand what you mean when you refer to this program operating at this or that hospital, that she is not within their residence area.

A. It is a federal program for maternal and infant care.

Q. I am familiar with it.

A. And that does go by certain neighborhoods and she—I have checked with the office at Broad and Pine, Broad and Lombard, wherever it is, and they said if she lives outside the area she is not eligible.

Episcopal Hospital will accept her only if she has lived in that area or can pay the—I think it is $19 for attending the clinic and then there would be another sum for the delivery.

Temple Hospital cannot accept her. Frankford Hospital has no funds for that program either.

BY JUDGE KALODNER:

Q. What is her problem? What medical care does she need?

A. She is pregnant and because of the numerous pregnancies she has developed terrible varicosities. Her veins are in very bad shape.

BY JUDGE LORD:

Q. Do you mean, you may be saying exactly this, but I would (40) like to be sure of it, that if some people in Philadelphia live in a given area there is no way that they can get free medical care?

A. This is primarily—certain type of care they cannot get. Any hospital will give free emergency care. They will not necessarily accept a nonresident for continued regular care.

Q. What do you mean by nonresident?

A. Anyone who has not been here a year.

JUDGE LORD: Oh, I see.

BY JUDGE KALODNER:

Q. So they do have a residence requirement?

A. Yes.

BY MR. CASPER:

Q. I would like to understand you. You are saying this is in fact the practice?

I mean I know the law and the law does not provide for this. It says absolutely no residence requirement.

A. Under the new program care has been easier to get but the giving of the program seems to vary from hospital to hospital.

BY JUDGE LORD:

Q. What I am interested in knowing is are you telling us that there are certain areas in the City of Philadelphia where (41) people living in those areas cannot get medical care that they need?

A. Yes, in our agency we have found several like that, but—that is, they cannot get continuing care. Emergency care they can always get. If it is something like a diagnosis of tuberculosis or something like that, there is no problem.

Q. I am talking about somebody that is pregnant and has varicosities.

A. Unless they live within the area of the hospital it may be not possible to get it.

BY JUDGE KALODNER:

Q. Not all hospitals have the program; is that it?

A. Yes, it has become easier with the grant and the new Pennsylvania medical care program.

MR. CASPER: I shall investigate these facts as soon as I get back.

BY MR. CASPER:

Q. Will you tell me this, please? Did you investigate the possibility of one of the other private agencies that are active in the field of maternal care, particularly in the case of unmarried mothers?

Did you investigate that possibility?

A. Ordinarily the agencies working with unmarried mothers— it is primarily around planning for the mother and the child (42) to be born rather than other children.

Q. This is true. Did you, however, consider it?

A. It was something I considered but I did not actually contact them.

Q. What I am asking you really is what possibilities did you explore in the public sector and in the private sector with respect to a plan that would tide Miss Smith over, as it were?

We are talking about what is for the purposes of argument here a temporary problem.

A. Yes.

Q. I am asking you the question: What possibilities did you explore in the public and in the private sector?

JUDGE SHERIDAN: Are you dealing only with respect to this pregnancy or this other thing. The other children have to be fed.

MR. CASPER: That is what I meant to include, Your Honor, for example when I referred to a possible temporary foster home program for the other children.

JUDGE SHERIDAN: You are going beyond the pregnancy now? Your question encompasses all the other children too?

MR. CASPER: Yes, Your Honor.

A. Do you mean a program until December when she will establish (43) residence?

Q. Yes.

A. The primary family care agencies that give financial assistance are agencies such as Salvation Army, the Episcopal Family Service, the Jewish Family Service. Most of them do not give long-time financial assistance.

Essentially we are the agency that they turn to in those situations.

Q. I understand that the practices vary. My question is specifically, did you in detail explore possibilities of tiding Miss Smith and her family over to next December in whatever way, with foster home care, with care for her situation, maternity care, with the public sector, the City Department of Public Welfare and the various private organizations of whom you know who may primarily not be concerned with the Miss Smiths?

Did you explore the possibility?

A. I did not contact the agencies because of our experience with them in other cases.

MR. CASPER: Thank you. I have no other questions.

(Witness excused.)

(44) JUDGE LORD: Anything else?

MR. GILHOOL: Your Honor, I have no further witnesses.

I think we have demonstrated that in the absence of assistance and with the termination of Travelers Aid plaintiff faces three choices, each of which necessarily would work to her irreparable harm.

One is to attempt, albeit against the hard facts of life, to maintain herself with her children at their present residence without any source of income.

The other is to place her children in foster care, and the third is to return to Delaware which, of course, is both contrary to her intent and her purpose and would forfeit the very rights that she is here claiming.

I think, Your Honor, we have established on the one hand that the harm to the plaintiff is extraordinary. On the other hand, Your Honors, we are talking here about assistance in the amount of $115 every two weeks.

This burden on the Commonwealth is certainly a negligible one. I am prepared, if Your Honors wish, to address the legal questions which are as I see them not only serious questions with respect to this statute, but as I see them now are sufficiently serious questions to require that that statute be struck down.

(45) JUDGE KALODNER: It is not enough for you to show that there will be irreparable injury and damage done if you don't receive the temporary injunction.

You must show some right to it, the basis for it.

MR. GILHOOL: Yes, sir.

JUDGE KALODNER: Tell us, by the way, what does the Anti-Poverty Program do; simply refer people to lawyers who refer them to other agencies?

Doesn't the Anti-Poverty Program do anything for people in need?

MR. GILHOOL: Yes, sir. It does quite a great deal for people in need. In Miss Smith's case it put her in touch with Travelers Aid.

JUDGE KALODNER: What about the lawyer who put her in touch with Travelers Aid?

MR. GILHOOL: Yes, sir, the lawyers work and have their offices with the other PAAC workers.

JUDGE KALODNER: Does it do anything else other than to refer them to counsel and various public charities?

MR. GILHOOL: Yes, sir.

JUDGE KALODNER: Or private charities?

MR. GILHOOL: Yes, sir. For example, on each (46) of the many occasions over the last five weeks Miss Smith has had to travel from Frankford to center city in order to receive assistance from Travelers Aid.

They have taken care of her children on each occasion when she has had to come into center city.

JUDGE KALODNER: In what way have they taken care of the children?

MR. GILHOOL: Babysitting.

JUDGE KALODNER: They provide babysitters. Do they provide any financial aid?

MR. GILHOOL: No, sir, they have no funds whatever—

JUDGE KALODNER: It seems to me Anti-Poverty Program is a misnomer.

JUDGE LORD: No, I think it is well named. It apparently has no money at all.

JUDGE KALODNER: Let me say that it seems to be impoverished in its administration and its functioning as well as the name.

MR. GILHOOL: No, sir. I am not here either to defend or to—

JUDGE LORD: Mr. Gilhool—

MR. GILHOOL: —act as protagonist for the Poverty Program. I am here for my client.

(47) JUDGE LORD: Excuse me.

MR. GILHOOL: Excuse me, sir. Go ahead.

JUDGE LORD: If the Anti-Poverty Program can act as a babysitter, couldn't it do that and perhaps Miss Smith could attempt to get a job?

MR. GILHOOL: A fine question, Your Honor. The Anti-Poverty Program as you suggested and as Judge Kalodner has suggested is not entirely the most fulsome program in the city. The office in Frankford—

JUDGE KALODNER: That is the understatement of the century. It is the most impoverished program in the city.

Let me suggest this to you; if hey paid for a babysitter why couldn't they pay her to sit for her children?

MR. GILHOOL: Your Honor, that question I think would have to be addressed to Congress and the Office of Economic Opportunity in Washington.

JUDGE KALODNER: If they paid somebody else to sit for the children why can't they pay for the mother of the children to sit?

MR. GILHOOL: Sir, it is not a question of—

JUDGE LORD: I don't know that they did.

JUDGE KALODNER: You say they paid for babysitters?

(48) MR. GILHOOL: No, sir. Staff members of the Anti-Poverty Action Council in Frankford have—

JUDGE KALODNER: They paid them?

MR. GILHOOL: Yes, sir. They paid two social aides who act in many capacities, among them referral capacities in the search for whatever might be required for the needs pressed upon the family who chances to be their client, and in the course of that they of course will do what is necessary to assist, to expedite, to make possible that assistance from third parties and so they will within the limits of their staff time babysit every couple of days.

JUDGE KALODNER: They are a booking agency. They book business for private agencies?

MR. GILHOOL: Yes, sir. Unfortunately, unlike a booking agency, they don't work on a commission.

JUDGE LORD: Well, Mr. Gilhool, I am interested in this.

You said that when Miss Smith had to go into town to see Travelers Aid—

MR. GILHOOL: Yes.

JUDGE LORD: —that the Anti-Poverty Program or whatever it is acted as a babysitter so that she—

MR. GILHOOL: One of their staff members did.

JUDGE LORD: One of their staff members did, (49) I understand.

MR. GILHOOL: Yes.

JUDGE LORD: Now, my question is, if they are set up to babysit why couldn't they babysit while Miss Smith got a job?

MR. GILHOOL: Your Honor, they are not set up to babysit 40 hours a week.

JUDGE LORD: I see. All right, that answers my question.

MR. GILHOOL: Judge Kalodner, I should like to respond to your question which I took as going to the legal basis of the claim here.

JUDGE KALODNER: You have to assert the legal right which will fall on the basis of our jurisdiction. We may be entirely sympathetic but nevertheless unless there is an assertion of a reasonable legal right, how can we act?

MR. GILHOOL: You have before you, Your Honor, a memorandum of law reviewing I think in sufficient detail to make it clear that not only is there a substantial constitutional question here—

JUDGE KALODNER: How is there a substantial question? You keep on saying there is a substantial question.

How?

You say that there is an interference under (50) the commerce clause.

MR. GILHOOL: Yes, sir.

JUDGE KALODNER: How?

MR. GILHOOL: Sir, if I may, let me start with argument No. 3 at page 14 of the memorandum.

MR. CASPER: May I interrupt, Your Honor?

May I have a copy of that?

JUDGE KALODNER: I have a copy of it here.

MR. GILHOOL: All citizens of the United States by virtue of the protections of liberty accorded by the Fifth and Fourteenth Amendments have the right to travel freely from state to state.

This proposition is at this date extraordinarily clear. At page 14, at the bottom of page 14, proceeding from Kent vs. Dulles to Aptheker vs. United States and United States vs. Guest, the court has, and in the latter particularly, unanimously made it very clear that there is a liberty freely to travel from state to state and that that liberty is, as in the words of Aptheker, the court, the majority in Aptheker, is a constitutional liberty of the order of First Amendment rights.

The Court is well aware of the proposition that First Amendment rights and any address of protected areas by the state require that that address be most narrow, most (51) precise, and most proper in attempting to achieve its legitimate purpose.

The United States Supreme Court in Sherbert vs. Verner, which is discussed, Your Honors, at page 14 of the brief, held in a case quite like this that a state may not condition the receipt of assistance benefit upon the surrender of a constitutional right. The

constitutional right in this case was freedom of religion.

JUDGE KALODNER: That was a case where the woman said she wouldn't go back to her job because it required Saturday work and that was in conflict with her religious belief, and the Court held the state could not refuse to pay the unemployment for that reason.

That is not the situation here.

MR. GILHOOL: Yes, sir. It is exactly the same situation.

JUDGE KALODNER: How?

MR. GILHOOL: Juanita Smith lived in this Commonwealth in 1959.

JUDGE KALODNER: She has been away from here for five years.

MR. GILHOOL: That's right, but in leaving she exercised her right freely to move from state to state, a liberty of the highest order.

(52) In so moving, now having exercised that right, the Commonwealth says to her in terms of this residence requirement that since you moved we will not grant you assistance.

JUDGE LORD: Now, let me ask you this then.

Suppose in the exercise of her right to travel she went from Philadelphia to Delaware and she said to Pennsylvania I want you to continue paying my public assistance and if you don't pay it simply be-

cause I moved out of Pennsylvania you are interfering with my right to travel.

MR. GILHOOL: Our claim here, sir, is not that the state must affirmatively support the right to travel. On the contrary, our claim only is that the state may not limit the right to travel.

It is a legitimate interest of the state, it seems to us, and perhaps this is the minimal test permissible, both under this section of the Constitution and under equal protection, that public assistance should be conditioned upon presence in the state and, of course, all those other criteria.

JUDGE SHERIDAN: Would your argument be any different if she had never lived in Pennsylvania?

MR. GILHOOL: No, sir. It would be a bit different but it would still go to liberty, sir.

We are dealing in this regulation with a right (53) that inhibits and deters the exercise of the liberty.

JUDGE KALODNER: Were you counsel in the Delaware case? The District Court has been designated to hear this question. Delaware has a similar one-year eligibility.

MR. GILHOOL: Exactly, and many of the states do, Your Honor.

JUDGE KALODNER: Were you in that case? If you weren't, I won't ask you a question.

MR. GILHOOL: No, sir. I am not in that case.

JUDGE KALODNER: All right, I wanted to ask whether in that case there is also a return of the native, so to speak.

MR. GILHOOL: I don't know, Your Honor. I dare say, however, the time for residence requirements at least in the judgment of the members on this side of the Bar has probably come for review. In addition to that case there is a case pending before a three-judge court in Hartford, Connecticut, presided over by Judge Smith. That Court denied a motion to dismiss.

As the Court is no doubt aware a state court in Utah did on January 27 issue a preliminary injunction in a case of exactly these circumstances.

JUDGE KALODNER: Why didn't you take this to the State Court, may I ask?

(54) You are attacking the constitutionality of the state law. Why didn't you test it in the State Court?

Isn't that the proper forum for testing the liberty or the constitutionality of a state act?

MR. GILHOOL: Your Honor, among the constitutional rights we are especially contesting here are rights that are inherently in the nature of federal rights.

JUDGE KALODNER: You say you are being barred from the exercise of the liberty to travel freely from state to state; that therefore that statute is unconstitutional.

Why don't you go to the State Court?

MR. GILHOOL: Because we preferred to raise this question of such considerable magnitude and relating to so many matters important in the Constitution in Federal Court, and we have that right.

JUDGE KALODNER: Aren't the State Courts competent to decide those questions?

MR. GILHOOL: Yes, but the choice, Your Honor, of forum on a constitutional matter rests with us.

This Court is a three-judge court and, as Your Honor knows, there are certain advantages procedurally and otherwise to being heard before you.

JUDGE KALODNER: I don't know that that is such an advantage.

(55) MR. GILHOOL: Your Honor, if this question, as I think it is, is a question of great importance not only to plaintiff but to seven million poor people in this country here now receiving public assistance and who, because of the multiplicity of residence requirements among the states, are essentially reduced to a status—are essentially prohibited from mobility. The poor must stay put.

JUDGE KALODNER: All right, give us your argument on the commerce point.

MR. GILHOOL: I have given you my argument on liberty.

JUDGE KALODNER: Are you familiar with the fact that the State of Pennsylvania and most states have a residence requirement before you can vote?

MR. GILHOOL: Yes, sir. I certainly am.

JUDGE KALODNER: Are those acts unconstitutional?

MR. GILHOOL: No, sir. I think not. Indeed, the Supreme Court has recently held that they are not.

JUDGE KALODNER: Exactly so. The City of Philadelphia specifies by its Charter that one cannot be employed by the City unless one is a resident of the City.

MR. GILHOOL: Your Honor, that is another matter. I think the same argument that applies here would probably apply to employment.

(56) With respect to the voting requirements I might note that on next Tuesday the voters of this state will act on a constitutional amendment that would lower that requirement to three months.

JUDGE KALODNER: But still it is a requirement.

MR. GILHOOL: Your Honor, in the Fourth Circuit case affirmed by the United States Supreme Court it was made very clear what legitimate interests the state had in the establishing of voting residence requirements for voting and chief among those was, as Your Honors will recall, a question of residence requirement for voting in federal elections, and chief among the reasons thought permissible by the Court to justify such a requirement was the interest of the state in assuring that in contemplation of the Electoral College and the summation of votes by state the state therefore had an interest in assuring that all those who voted and hence controlled how Maryland went in the Electoral College, had some acquaintance with the community, understood the problems of that community, understood the relation of the issues in that election to the community.

Now that justification is not present here.

JUDGE LORD: That one isn't, but do you say there is no legitimate state purpose whatsoever?

MR. GILHOOL: Yes, sir. I find it impossible (57) to discover any legitimate state purpose here.

JUDGE LORD: All right, I don't want to interrupt you in mid-flight.

MR. GILHOOL: The one purpose, Your Honor, that might be postulated, that might possibly be permissible, is referred to at page 6 of the memorandum, and that is the prevention of abuse of public assistance, this public assistance program by persons coming to Pennsylvania with no motive but to obtain assistance.

As I argued with respect to liberty, any regulation of liberty must be the narrowest consistent with the objective.

With respect to equal protection classifications that sweep with undue breadth, they are suspect indeed. They are invalid.

That purpose, if proper, is not served consistent with those strictures by this statute, for this statute excludes not only those who may come with a motive to secure welfare, and plaintiff did not come with that motive, but it excludes also those who may come for very good reasons, reasons that Mr. Justice Douglas talked about in concurring in Edwards vs. California; that is, the search for new horizons, for opportunity, for jobs, for education, for whatever, for what people generally move from place to (58) place in order to secure.

JUDGE LORD: True enough, but Edwards vs. California was a different case.

JUDGE KALODNER: That was entirely different.

MR. GILHOOL: Well, sir, in this case Pennsylvania has said to Juanita Smith that she may not come to Pennsylvania.

JUDGE KALODNER: It didn't say she may not come; it said if you come to Pennsylvania you must live here a year before we will grant you unemployment relief or mother's assistance.

MR. GILHOOL: The Commonwealth is, however, now, Your Honor, saying to Miss Smith that she must return to Delaware.

JUDGE LORD: No, they are not.

JUDGE KALODNER: They are not saying that to her. They are saying you can live here, because the letter says we are cutting you off because you failed to meet the one-year eligibility requirement.

It doesn't say you have got to go back to Delaware.

Miss Haimowitz said her agency thought she could go back to Delaware and receive relief there and that is why they won't help her, but that is not the Commonwealth's—

(59) The Commonwealth is not sending her back.

MR. GILHOOL: That is something like what South Carolina said in Sherbert vs. Verner and it is something like what the state said in Speiser vs. Ran-

dall; i.e., unless in the one case you surrender your freedom of religion we will not assist you.

JUDGE KALODNER: What freedom are they asking her to surrender?

MR. GILHOOL: They are asking that she surrender her liberty to move from place to place.

JUDGE KALODNER: That is utter nonsense, in my opinion.

JUDGE LORD: Let me ask you this question, Mr. Gilhool. Hypothesize with me for a moment, if you will.

A bum, a hobo, who travels from state to state, in the summertime he goes to Maine, in the wintertime he goes to Florida, and he passes through various states on his travels and he decides, well, I will stay in South Carolina for about a week and pick up a little public assistance; then I will move on to Georgia and I will stay there a week and I will pick up a little public assistance.

MR. GILHOOL: Your Honor, in that case if restricting the movement of that person were permissible and I argue that it is not permissible, in light of liberty (60) and in light of the commerce clause and privileges and immunities of the 14th and the 4th, but if it were permissible this statute is not sufficiently narrow to achieve that purpose.

JUDGE LORD: Excuse me. I didn't finish my question.

MR. GILHOOL: Yes.

JUDGE LORD: Which I will do.

Would you say that a state is constitutionally prohibited from saying that unless you are in the state two weeks we won't give you any public assistance?

MR. GILHOOL: Yes, I would, Your Honor. The state can't do that. Yes, that's right.

JUDGE KALODNER: Can or cannot?

MR. GILHOOL: Cannot.

JUDGE KALODNER: Well, you are consistent.

In other words, the hobo coming into Pennsylvania has the right to receive assistance?

MR. GILHOOL: Yes, sir.

JUDGE LORD: In other words, the state can provide no reasonable regulation whatsoever.

MR. GILHOOL: The state can, Your Honor, provide—

JUDGE KALODNER: Answer our question.

(61) Can the hobo come into Pennsylvania and receive assistance?

MR. GILHOOL: Yes, sir.

JUDGE LORD: In other words you say there is—is the right to be a hobo, a First Amendment right or a commerce clause right?

MR. GILHOOL: No, sir. The right of a hobo to move across state lines is a right of First Amendment stature. It is a right of national citizenship. It is a right that is essential to the constitutional commitment to one nation.

JUDGE LORD: And a state must not interfere with that?

MR. GILHOOL: Sir, it might in the presence of extraordinary necessity interfere with such a right. That standard is the standard that has been applied in the cases cited in argument B of the brief. Those cases deal with the right to travel freely from state to state as based on the rights of national citizenship and is derived from our federalism.

In those cases it is clear that the state can act only in the presence of extraordinary necessity. We are not dealing with any such necessity here.

The purpose of the state in enacting this qualification can in no sense be regarded as one of extra-
(62) ordinary necessity. Edwards and California makes that very clear.

In Edwards and California indeed we were dealing in a historic period when, not in numbers I dare say and not in severity by any contrast with the rest of society, when the country was still recovering and still largely in a depression, and when the question of interstate migration was particularly acute, and when as the Court in Edwards stated the burdens imposed upon a state by the movement of indigents into that state in financial terms might well be worth, they said staggering, nonetheless, the Court held that it was not permissible for a state to attempt to close its boundaries solely to protect its purse.

JUDGE KALODNER: The Supreme Court declared that that law was unconstitutional.

MR. GILHOOL: Your Honor, this statute has inevitably an exclusionary effect. It has such an exclusionary effect, Your Honor, as to—

JUDGE KALODNER: By the way, by the same token this lady, if she came to Philadelphia, couldn't get a job because she is not a resident of Philadelphia. Therefore she would be excluded in exercising certain rights, the right to make a living.

MR. GILHOOL: The statute, however, sir, has (63) not guaranteed by the state to anyone the right to make a living. It has, however, by statute established for the needy the benefit about which we are quarreling here.

JUDGE KALODNER: We get your point, I think.

MR. GILHOOL: With respect to the question you asked as to whether there is in fact an exclusionary effect, Toomer versus Witsell, referred to on page 5 of this brief and which is discussed somewhat more extensively at page 12 of this brief, involved a discrimination in state statute imposing license fees on commercial fishing between residents and nonresidents.

The differentiation there, sir, was something in the order of $250. The Court held that this differentiation had an effect so great that it was exclusionary.

JUDGE KALODNER: Do you think that situation is analogous to the situation here?

MR. GILHOOL: Yes, sir. I certainly do think it is.

JUDGE KALODNER: That is a difference of opinion. That is what they say makes horse races.

MR. GILHOOL: We are dealing here, sir, with a plaintiff who because of her prior citizenship in Delaware is being discriminated against by the Commonwealth of Pennsylvania.

(64) JUDGE KALODNER: All right.

JUDGE SHERIDAN: I want to ask you one particular question.

Is this father, as I recall the law, still liable for the support of his daughter, Miss Smith?

MR. GILHOOL: Yes, sir. He is in the law liable for their support.

JUDGE SHERIDAN: You haven't exhausted that.

MR. GILHOOL: As Your Honor knows, liability at law for support is quite a different thing from the reality of support.

JUDGE SHERIDAN: We can't assume that.

MR. GILHOOL: The plaintiff here testified, Your Honor, that in previous support actions against two of the gentlemen in question—

JUDGE SHERIDAN: Excuse me. I am talking about her own father.

MR. GILHOOL: Her own father, Your Honor? Plaintiff here testified that he has six children of his own.

JUDGE SHERIDAN: That is correct.

MR. GILHOOL: And a second wife. Her own father, Your Honor, plaintiff testified, lost his job in January. Either of those circumstances and each of them, Your Honor, would preclude under the law of the Commonwealth of (65) Pennsylvania any support from him.

JUDGE SHERIDAN: That would preclude it? I wouldn't know that.

MR. GILHOOL: Yes, sir.

JUDGE SHERIDAN: He may very well be able to support her or take her in.

JUDGE KALODNER: Anything else?

MR. GILHOOL: That's all from my side.

I thank you, Your Honor.

JUDGE KALODNER: All right, Mr. Casper.

I understand you haven't seen the brief but you were put on notice, as it were.

Do you have anything to say now?

MR. CASPER: I would like to say this, Your Honor. I don't think I could distinguish the Edwards case any better than the Court could, so I won't say anything more about that.

JUDGE LORD: That is the safest way.

JUDGE KALODNER: By the way, has there ever been an attack made on the constitutionality of this provision in Pennsylvania?

MR. CASPER: No, Your Honor.

JUDGE KALODNER: It has been in effect for 30 years now.

(66) MR. CASPER: Yes. I do want to say this, starting at the end, the legal point of view.

Obviously plaintiffs are trying something new. There isn't any authority they can rely on and I want to say this.

This is not a situation where the Commonwealth says to anybody keep out of Pennsylvania. It is merely a regulation of a grant system and Mr. Gilhool has said time and time again he doesn't say there is a constitutional right to public assistance. The exclusionary effect that he talks about won't be any different on anybody outside of Pennsylvania if Pennsylvania had no public assistance at all.

He says there is no such right, so if you are going to be logical about that the exclusionary effect is not something that is specifically traceable to this one year's residence requirement. That is first.

Secondly, it is sort of strange to talk in one sense about the exclusionary effect. The plaintiff in all the cases that we have are people who haven't been excluded. I didn't ask Miss Smith in the context whether she knew anything about the Pennsylvania Public Assistance Law before she ever came here, but there has been a study, Your Honor, I don't want to testify here, but it seems highly unlikely that decisions to move about, whether it is by the hypothetical hobo (67) or by somebody who is in search of a better life and usually sets his sights way above the dole. It is not one of those things as if people sit down and

calculatedly make determinations in terms of durational residence requirements of public assistance.

Residence requirements with respect to all sorts and kinds of state regulations have been not only known for years, they are current today. I happen to be a lawyer. If I want to go to Florida because I like the sun I can go to Florida, it is my constitutional right, but I can't practice law, not for ten years. It is part of their law. That one hasn't been challenged yet as far as I know.

Now, I am affected by that and there are any number of other residence requirements; not only the voting one but with respect to all sorts of facilities made available by states through their economy. Because of the limited resources that this particular state has in its economy it has a first and primary duty to its residents.

I don't want to say any more about the legal part of it but I do want to say on the question of irreparable injury it is interesting to note in this case that first of all I suggest plaintiff has not made out a case of irreparable injury. He has not suggested that Miss Smith will starve. I don't think she will starve in this particular situation and (68) please don't understand me in the wrong way. I do understand that there are from a humane point of view very serious problems of poverty involved and I don't want to make light of them.

I am just saying in the legal setting I don't think plaintiff has made out a case of irreparable injury.

First of all, you may recall in my cross-examination I had very grave doubts as to whether the potentials for help in this situation really have been properly exhausted. I asked that of both Miss Smith and the lady from Travelers Aid, whether there had been a detailed contact with the City Department of Public Welfare who, after all, have a responsibility in this matter under the County Institution District Law. The City Department of Public Welfare is in Philadelphia the County Institution District and I have not been told of any efforts made, of any plans looked at.

Now, we do know about a different program, a foster care program which, incidentally, is paid for at more than the public assistance rate but if you take all these things into consideration, these are all possibilities and they haven't been explored yet. How can we meaningfully talk about irreparable injury? That is one.

Two, as Your Honors know, there is even in Pennsylvania, never mind about Utah and Connecticut and (69) Delaware, another case raising the same questions in a different district and that is Leila Waggoner in Pittsburgh.

Now, what is the difference? The difference is that in this case Miss Smith came from Delaware and the County Board of Assistance thought when she applied there was a reciprocity agreement between Pennsylvania and Delaware in force, and gave her two checks. They found they made a mistake.

JUDGE KALODNER: In this case?

MR. CASPER: Yes, in this case. In the Waggoner case Mrs. Waggoner applied for assistance and there was no question of any reciprocity agreement from California, and they immediately said you haven't been here one year, you are not eligible.

Now, Your Honors, you have got the same constitutional issue involved. Would it in any sense be fair to say that because the County Board of Assistance made a mistake to the extent of two payments—

JUDGE KALODNER: No one is arguing that here.

MR. CASPER: I beg pardon, let me finish, to say that to enjoin the County Board from discontinuing assistance which they paid—

JUDGE LORD: If we do it we will do it a little differently. We will enjoin them from refusing to pay.

(70) MR. CASPER: I understand, Your Honor. I am not going to say any more about that.

JUDGE SHERIDAN: Do I understand that if these children went into a foster home, in December then she could get assistance?

MR. CASPER: If she is then financially eligible, yes, Your Honor.

That is all I have, Your Honor.

JUDGE LORD: We will take it under advisement.

(Adjournment)

In the United States District Court for the Eastern District of Pennsylvania

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(Title Omitted in Printing)

VII.

CONTINUED HEARING SUR PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

May 29, 1967

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(73) JUDGE LORD: Smith against Reynolds et al.

MR. GILHOOL: May it please the Court, I have a motion for determination by this Court that a class action may be maintained.

JUDGE KALODNER: Why do you need it?

MR. GILHOOL: Strictly speaking I suppose I don't need the motion.

JUDGE KALODNER: Then why are you doing something you don't have to do?

JUDGE LORD: I think he does.

MR. GILHOOL: Sir, it was suggested by the Court that it might be appropriate, and I have it with a draft order for Your Honor's contemplation.

The Health and Welfare Council by its counsel, Frederic Ballard and Matthew Strickler, have authorized me to say to the Court that they have authorized a petition for leave to appear amicus curiae and will, with the Court's permission, have a brief this week.

I have, Your Honor, three, perhaps four witnesses this morning and I should like—

JUDGE KALODNER: Everybody might as well file. We will have a free-for-all.

MR. GILHOOL: Yes, sir. This is a matter that concerns a great many people and a great many people are (74) interested in addressing the Court on the matter.

If I may I will proceed with my first witness.

JUDGE LORD: Yes, go ahead.

MR. GILHOOL: Miss Deborah Davis, please.

MR. CASPER: If I may, Your Honors, I would like to know if I may what Mr. Gilhool is seeking to prove by putting on this testimony today.

JUDGE LORD: Are you asking for an offer of proof?

MR. CASPER: Yes, sir.

JUDGE LORD: We can probably do it just as quickly by the witness, since there is no jury present.

MR. GILHOOL: Your Honor, very shortly, Miss Davis is the Director of the Bureau of Assistance

Policies and Standards, Office of Public Assistance, and as such has particular responsibility for the administration and oversight of the operation of the residence requirements.

It is the administration and operation of that requirement that she will testify to.

DEBORAH DAVIS, sworn.

Direct Examination

MR. CASPER: Your Honor if I might I still (75) I don't know how this will be relevant to the issue.

JUDGE KALODNER: Keep your voice up.

MR. CASPER: Your Honors, I still don't know how Miss Davis' evidence will be relevant. It appears we are here on a question of law.

JUDGE KALODNER: Did you move to dismiss? I can't recall anything of record.

Did you move to dismiss?

MR. CASPER: No, I believe I did state though, Your Honors, that apart from the fact that we put in question with respect to the complaint I believe we did say in the answer, we didn't make a separate motion to dismiss, but I believe it is perfectly all right to state as we did in our pleadings, in our answer, that there is no cause for which relief can be granted.

JUDGE LORD: That may be, that you alleged that, but we have nothing before us on which to act with respect to a motion to dismiss.

MR. CASPER: No, Your Honor. I understand that.

I merely would like, since we have had a hearing and know what the case is about, and the question is the constitutionality of the residence requirement, I don't want to be carping about it, but I just would like to know (76) what the relevance of the proposed testimony is to the issue that is before the Court.

JUDGE KALODNER: I can't understand the Attorney General's office in this respect. It seems as if the right hand doesn't know what the left hand is doing.

In the case of Leila Waggoner in the Middle District of Pennsylvania in which a constitutional court has been appointed, in that case they have moved to dismiss the complaint and for summary judgment. In this case they haven't.

MR. CASPER: No, there is an explanation for that, Your Honor. If I may say so, I thought that the same thing was accomplished since the Waggoner case was the first one, and I think we would go along, in Pennsylvania.

JUDGE KALODNER: What difference does that make, whether it is the first or not?

If you agree that a motion to dismiss should be filed, why wasn't it filed in both cases?

MR. CASPER: It is my understanding we would not file a motion to dismiss or, in the alternative, for summary judgment, until we were faced with the question of having had at least one hearing in this case

and whether we could arrive at a situation of quick disposition.

JUDGE KALODNER: Without having moved here for it?

(77) MR. CASPER: I believe we have done this, in effect, by our allegation in our answer which I believe is the same as a motion to dismiss.

JUDGE LORD: It certainly is not.

JUDGE KALODNER: I don't know whether—how you can say that, whether in state practice or Federal practice, that the denial of the cause of action in an answer is equivalent to a motion to dismiss, or for summary judgment.

MR. CASPER: Only on the ground, Your Honors, that some of the matters that had been alleged as a basis for your motion to dismiss, you can instead put into an answer.

JUDGE KALODNER: What?

MR. CASPER: You can put into an answer the same allegation.

JUDGE KALODNER: I don't think that is a valid answer.

MR. CASPER: Very good.

JUDGE LORD: Go ahead, Mr. Gilhool.

MR. GILHOOL: Thank you, Your Honor.

BY MR. GILHOOL:

Q. Miss Davis, what is your occupation?

A. I am Director of the Bureau of Assistance Policies and Standards in the Office of Public Assistance.

Q. How long have you held that position?

(78) BY JUDGE KALODNER:

Q. That is in the Commonwealth of Pennsylvania?

A. The Commonwealth of Pennsylvania. I have held the position since 1958.

BY MR. GILHOOL:

Q. What previous positions have you held?

JUDGE KALODNER: What difference does that make? Really and truly, what difference does it make here?

MR. GILHOOL: Your Honor, I want to indicate—

JUDGE KALODNER: This lady has been there since 1938. That is almost 30 years.

MR. GILHOOL: Your Honor, '58.

JUDGE KALODNER: '58? What is the difference? She has had nine years.

MR. GILHOOL: Your Honor, her previous positions with public assistance will indicate the range of her experience with public assistance and the matter before the Court.

THE WITNESS: I have been employed by the Department for 32 years. I have worked in various positions of responsibility.

BY MR. GILHOOL:

Q. Would you indicate what those positions have been?

A. Since 1944 I have been in the State Office, Harrisburg (79) office, and I have held positions as a field representative, as an assistant to the Director of Field Service, and as a policy specialist.

Q. And you have also served as a supervisor and as a case worker, have you not?

A. In the County I served as a case worker and supervisor, yes.

Q. What are the duties of the Bureau of Policies and Standards?

A. The duties of the Bureau are primarily the development of policies and procedures in accordance with the law and Federal requirements. We have additional duties, one of which is the analysis of complaints, appeals that come to the office from all sources, including representatives, clients themselves. We also have responsibility for interpreting policy and it is in this responsibility we deal with the counties and with the field staff.

Q. What are the duties of the Bureau with respect to the residence requirement?

A. The duties—

BY JUDGE LORD:

Q. Miss Davis, are you reading from something?

A. No.

(80) Q. I didn't think you were and therefore would it be convenient for you to keep your head up, because you are dropping it below the level of the Bench and that is cutting off the flow of sound.

A. I will pull myself up here.

JUDGE LORD: Yes.

JUDGE KALODNER: Read the question.

(The following read by the reporter:)

"Q. What are the duties of the Bureau with respect to the residence requirement?"

THE WITNESS: In respect to residence we have developed the regulations in accordance with the Pennsylvania State Law and our responsibility there extends to getting reciprocal agreements as provided by law with other states.

BY MR. GILHOOL:

Q. How many applicants in calendar 1966 were rejected because of the residence requirement?

A. 1520 families and 2—

JUDGE KALODNER: 15—

A. (Continuing) 1520 families and 2,967 persons.

Q. Do you anticipate that a similar number will be rejected in this year and in the following year?

A. Yes, there has been very little change in the number over the years.

(81) Q. What are the characteristics of the rejected applicants?

A. The Department does not keep characteristics—

JUDGE KALODNER: Pardon me.

BY JUDGE KALODNER:

Q. Does this residence requirement extend to all phases of public assistance?

A. Yes.

Q. Blind, pensions?

A. It extends to all phases except medical assistance. The medical assistance program which went into effect in 1966, January 1, by Federal prohibition does not carry a durational residence requirement.

Q. But blind, pensions for the aged?

A. Yes, all the other categories that are assisted are subject to one year, yes.

BY MR. GILHOOL:

Q. The medical assistance program you speak of provides in-hospital care?

A. Yes, it provides in-patient hospital care, visiting nurses' services.

Q. Fine.

A. Post-hospital nursing.

BY JUDGE KALODNER:

Q. There is nothing in the legislation with reference to (82) that? There is no residence requirement as to that, is there?

A. No, we are specifically prohibited from having one by Federal law.

Q. So there is no legislative mandate with respect to medical assistance, as to the period of residence in the state?

A. No, no.

JUDGE KALODNER: All right.

BY MR. GILHOOL:

Q. What are the characteristics of the applicants rejected on the grounds of residence requirement?

A. Well, as I say, the Department itself does not keep records of the characteristics of people who are rejected on account of residence.

However, in 1959 Dr. Artigues of the Pennsylvania —University of Pennsylvania made a study in which I assisted and the findings I think remain valid, at least from the analysis that we are able to make from correspondence, and from that the figures that he

arrived at were 40 percent previously lived in Pennsylvania, 60 percent have relatives here, 64 percent came to get jobs and 37 percent had jobs when they came. 7 percent came because of health reasons.

Q. Do you have any sense of the stability of residence in the previous state of these applicants?

A. Yes, again from Dr. Artigues' study 50 percent lived (83) in the state from which they came over five years; less than 1/10 had less than a year's residence in the other state.

Q. Do you have any sense of the numbers of rejected applicants who had been recipients of public assistance in the state from which they came?

A. Only 10 percent had received public assistance in the states from which they came.

Q. Characteristically how long have the rejected applicants lived in Pennsylvania before they applied for public assistance?

A. One half have lived here six months before they apply for assistance from this state and two thirds had two or more months residence.

Q. Will you describe the characteristics of some of the rejected applicants that have come to your official attention in the last couple of weeks?

A. We have a number of case situations. For example, here is a woman 80 years old. She came to Pennsylvania to live with her son who died a few months later, leaving nothing. She applied for assistance. She was found ineligible—

BY JUDGE KALODNER:

Q. Old age assistance?

A. Yes, 80 years old.

Q. Yes?

A. Here is a man of middle age. He had been born and raised (84) in Pennsylvania but ran a business in another state.

His son was inducted into the Army last summer and sent to Vietnam. The man went to visit a married daughter in Israel. He was taken very ill.

He returned to Pennsylvania last fall and had three operations, for which he received medical assistance. He is now living with his mother and father, whose only income is Social Security. He has no insurance or income and cannot work.

The son, who is on emergency leave from Vietnam, made application for public assistance for his father's period of recuperation.

BY MR. GILHOOL:

Q. And the application was accepted?

A. The application would be rejected because he doesn't have residence in—

JUDGE KALODNER: What is the point of this examination? Undoubtedly hundreds of people are denied all forms of public assistance in Pennsylvania because they are unable to satisfy the statutory one-year residence requirement.

That is not disputed.

MR. GILHOOL: Yes, Your Honor. That is so.

JUDGE KALODNER: In other words, the Department of Public Assistance is giving effect to the legislative (85) mandate.

What is the purpose of this examination?

MR. GILHOOL: The purpose, Your Honor, is this. We are here challenging a statute of the Commonwealth of Pennsylvania. We think it important, therefore—

JUDGE KALODNER: It imposes a hardship on those who are unable to receive any and all forms of public assistance, because of the one-year residence requirement.

MR. GILHOOL: Yes, Your Honor.

JUDGE KALODNER: Is there any question about it?

MR. GILHOOL: No question whatever.

JUDGE KALODNER: All right, why do you need to offer proof?

MR. GILHOOL: We think it important, Your Honor, that the record should indicate with some precision exactly the characteristics of those who come under this requirement.

We think that germane, Your Honor, to a judgment here.

JUDGE KALODNER: We have two instances. You are piling up instances of cases.

Now, what useful purpose does that serve?

MR. GILHOOL: Your Honor—

JUDGE KALODNER: All these hardship cases are very moving.

(86) MR. GILHOOL: Simply, Your Honor, it makes a full record which I think important to the determination of this case.

JUDGE KALODNER: You can keep this up for a year. Do you think that would have any real value, by piling up the record?

MR. GILHOOL: Your Honor, Miss Davis has testified—

JUDGE KALODNER: I don't think that the Commonwealth could possibly contend that the one-year residence requirement does not result in hardship to those people who are denied assistance by reason of the one-year statutory requirement, or residence.

MR. GILHOOL: Yes, Your Honor.

JUDGE KALODNER: If they did deny it, of course, they would cite such a denial.

MR. GILHOOL: Your Honor, Miss Davis has testified as to some of those cases rejected here in Pennsylvania.

I should like her to go on and testify as to those on public assistance in other states who had previously resided here, whose applications have been rejected.

The significance of that testimony, Your Honor, is precisely the fact that those applicants for public assistance must come back to Pennsylvania or should have stayed (87) in Pennsylvania if they were to receive any income at all. That, Your Honor, goes—

JUDGE KALODNER: Because of migration? Because of migration people failing to meet the residence requirements from the state where they come, then they come back to Pennsylvania, they are unable to satisfy the residence requirement?

Is there any question about that?

MR. GILHOOL: Well, Your Honor, one of the questions in this case is whether the residence requirement does in fact bind recipients of public assistance into the state where they are receiving public assistance, and effectively prevent their mobility to other states.

Now, the testimony that I would like Miss Davis to proceed to goes to that question.

JUDGE KALODNER: You don't need any proof of that, do you?

MR. GILHOOL: If Your Honor thinks not I am very pleased to agree. I thought that was in dispute the last time we were before the Court.

JUDGE LORD: Mr. Gilhool, it seems to me, and I am speaking now only for myself and not for the Court, that the real question here involved is whether or not a state can impose a reasonable residence requirement, No. 1; that is, (88) whether it can constitutionally impose a reasonable residence requirement.

MR. GILHOOL: Yes, sir.

JUDGE LORD: And secondly, if it can, whether the one year is a reasonable residence requirement in this case.

MR. GILHOOL: Yes, sir.

JUDGE LORD: I have no idea of whether I speak for the Court or not, but I am merely voicing my own feeling.

MR. GILHOOL: Yes, sir. I would pose the questions exactly that way.

JUDGE KALODNER: What evidence do you have on that score?

MR. GILHOOL: The testimony to date, Your Honor, has indicated the rejected applicants share, with other needy residents of Pennsylvania, certain characteristics.

That certainly goes to the question of whether this is an arbitrary classification or—

JUDGE KALODNER: Nobody has argued the question of discrimination against this particular party or plaintiff in this case. That hasn't been raised.

MR. GILHOOL: Your Honor, I am—

JUDGE KALODNER: You are not charging discrimination against your plaintiff, are you?

MR. GILHOOL: Yes, sir. We are.

(89) JUDGE KALODNER: As a class?

MR. GILHOOL: As a class, yes, sir, proceeding from the face of the legislation.

JUDGE KALODNER: The point is the legislation is universally given effect in Pennsylvania.

BY JUDGE KALODNER:

Q. I would like to ask you one question. How many states, do you know—

JUDGE KALODNER: The Commonwealth has failed to offer any evidence. I have got to ask the witness.

The Commonwealth has failed to tell us in any of its pleadings, anywhere, any time.

BY JUDGE KALODNER:

Q. How many states have a residence requirement, whether it is a month or five years?

A. 44 states have.

Q. Pardon me?

A. 44.

Q. How many states have public assistance?

A. Oh, all states have public assistance.

Q. 44 have a limitation, residence limitation?

A. Yes.

Q. Can you tell us what those periods range, the range of those periods?

(90) A. They range from five years—I have all the residence requirements listed here as taken from the APWA Directory.

MR. GILHOOL: Your Honor, we should be pleased to present to the Court a copy of that record.

BY JUDGE KALODNER:

Q. Let the witness answer.

A. Arizona, five out of the last nine years for old age assistance; five out of the last nine years for blind; one year for ADC.

Q. Just what do you mean, five out of nine?

A. Five consecutive years out of—or five years out of the last nine. It can be any five within those nine years.

Q. They must have lived for a period of five years out of the last nine?

A. Right.

Q. This would take into account those who would move out and come back in?

A. Yes.

Q. All right, I just wanted to make it clear. Now, the other six states don't have any public assistance program, or do you have—

A. Oh, no. They have.

Q. Without residence requirements?

A. Oh, no. They have public assistance programs. Public (91) assistance is a national program.

JUDGE LORD: But no residence—

BY JUDGE KALODNER:

Q. I know, the Federal Government has one.

A. The states in order to get Federal money have to have a public assistance program.

Q. Are there any states in the union that don't have a public assistance program?

A. No.

Q. You spoke of 44.

A. Six have no residence requirement.

Q. There must be six states that have no residence requirement?

A. That's right.

Q. All right, what are they?

A. Rhode Island is one; New York, Kentucky, Hawaii.

BY MR. GILHOOL:

Q. Those states have no residence requirements?

JUDGE KALODNER: Let her finish, please. She is giving us the names of six.

She has given us four.

THE WITNESS: I gave you five, didn't I?

JUDGE LORD: Four.

(92) BY JUDGE KALODNER:

Q. Rhode Island, New York, Kentucky, Hawaii.

A. My mathematics are wrong. We had 46.

MR. GILHOOL: Your Honor, if I may, the 44 states—

THE WITNESS: 46 states.

MR. GILHOOL: —have residence requirements.

THE WITNESS: Right.

MR. GILHOOL: Fine. In fact, Your Honor, of those 46 three have residence requirements generally but not for aid to families for dependent children.

The District of Columbia has a residence requirement generally as well and there are four, as the record shows, that have no residence requirements whatsoever.

If I might leave the line I was pursuing, entirely satisfied with Your Honors' indication of the irrelevancy of the testimony to the facts that are undoubtedly clear, I might proceed.

BY MR. GILHOOL:

Q. Miss Davis, if the residence requirements were eliminated what would be the cost?

A. The cost would be $1,637,500 in state funds.

Q. And in Federal funds?

A. $1,400,000 in Federal funds, or a total of $3,037,500.

(93) BY JUDGE KALODNER:

Q. How do you arrive at that?

A. This is based on an estimate of the number of families who would apply for assistance as a result of dropping the residence requirement.

Q. How do you arrive at that, based upon what experience?

A. Well, what our research people did was multiply the number of rejected applicants on an average in a year and that comes out to—by three. They figured there would be three times the number of people applying.

BY MR. GILHOOL:

Q. And on what basis did they choose that factor?

A. On their experience with the other states, from other states that relatively few people apply for assistance or come to another state for assistance purposes.

Q. In other words, you contemplate no great influx of indigent poor because of the elimination of the residence requirement?

A. Right.

Q. Is this based on the experience in New York, Rhode Island, Kentucky and Hawaii?

A. This is based on the experience of New York and Rhode Island.

Q. With other changes in regulations have your projections (94) of additonal cost proved accurate?

A. Our projections of cost have proven exceptionally accurate.

Q. What is the present total public assistance budget of the Commonwealth of Pennsylvania?

A. The total budget is $336,557,000. That is for the fiscal year ending in June 30th.

Q. How is the public assistance budget formulated?

A. The public assistance budget is based on estimates of economic conditions, the number of people who will be affected by it during the year's period, and that about does it.

Q. Would the elimination of the residence requirements at all complicate the budgetary process?

A. Not for the number of people involved. We based our estimates on 362,000 people, so 1500 more or less isn't going to substantially affect that.

BY JUDGE KALODNER:

Q. How many people are receiving public assistance in Pennsylvania? How many cases do you have now of all facets other than medical assistance?

A. Other than medical assistance it is about 347,000 right now.

Q. So we may have it for the record, what categories are they, without a breakdown?

(95) BY MR. GILHOOL:

Q. What are the categories?

A. Old age assistance, aid to permanently and totally disabled, aid to families with dependent children. That is called ADC.

BY JUDGE KALODNER:

Q. That is generally called Widows' and Mothers' Assistance?

A. Yes, blind pension.

Q. And unemployed?

A. And general assistance.

Q. Those five categories?

A. Right.

BY MR. GILHOOL:

Q. Given the residence requirement, what administrative burden is imposed on the public assistance program by it?

A. In the policy that denies assistance to people it creates administrative problems in trying to search out other resources, in trying to get the kind of help that people need.

In connection with residence much of the problem goes right from the case worker up the line of administration. That is why I am loaded here with case examples, because we get them in the Harrisburg office.

BY JUDGE KALODNER:

Q. In view of the experience you have just recited to us, (96) having been with the Department of Public Assistance a number of years, the last eight or nine years in the important office you occupy, has there

been any representation made to the Legislature with reference to the elimination of the one-year residence requirement by the Department of Public Assistance?

A. Yes, there has. We have proposed a change in the residence requirement on a number of times but the latest one is a proposal of one out of five years.

Q. Is what?

A. The person have a one year's residence out of five years.

Q. And what happened to that proposal?

A. It was turned down by the Legislature. It is being reintroduced this year, I understand.

BY JUDGE SHERIDAN:

Q. Why hasn't the Department proposed the complete elimination of all residence requirements instead of coming to one of five?

There must be a reason.

A. There is a lot of feeling I think about assistance to persons who haven't been residents of Pennsylvania and a fear that it will greatly increase costs, which you can't counteract by estimates.

Q. How would it increase cost? I think your testimony has (97) been the opposite, hasn't it?

A. Yes, I know, but I am talking about the public opinion.

Q. My question is directed to the Department, not the public.

A. Well, this is why the Department doesn't get its proposals enacted by the Legislature, because there is a pool of opinion that the residence requirements result in an influx of people into the Commonwealth.

BY JUDGE KALODNER:

Q. In other words we can take from that that the Legislature hasn't agreed with the estimate made by the Department of Public Assistance as to the impact of a modification or total elimination of the residence requirements; is that a correct statement?

A. Right.

BY MR. GILHOOL:

Q. Has the experience of New York, Rhode Island, Hawaii and Kentucky been called to the Legislature's attention?

A. The experience hasn't actually—

BY JUDGE SHERIDAN:

Q. What?

A. The experience hasn't proved that there is an influx of people in to receive assistance. However, it hasn't relieved the sentiment, the feeling, even in New York.

(98) BY JUDGE KALODNER:

Q. That wasn't the question asked of you. The question asked of you by Mr. Gilhool is whether or not the attention of the Legislature was called by the Department of Public Assistance or some other agency or some other person or individual to the experience of New York and Rhode Island?

JUDGE KALODNER: Is that your question?

MR. GILHOOL: Yes, sir.

BY JUDGE KALODNER:

Q. Would you answer that? In other words, was the Legislature told about the experience of New York

and Rhode Island; to wit, that it did not increase and result in any great increase?

A. Yes.

Q. Of the case load?

A. Yes, the Legislature has been informed.

Q. That was before the Legislature?

A. Yes.

BY JUDGE SHERIDAN:

Q. Did Rhode Island and New York eliminate residence requirements recently?

A. Rhode Island has as long as I can remember.

Q. All right.

A. And New York has been around 1940, I think.

(99) BY MR. GILHOOL:

Q. You have testified that all but four of the states have residence requirements.

Does Pennsylvania have reciprocal agreements with other states?

A. Yes, we have reciprocal agreements with 17 states.

Q. Do you recognize this as a copy of the Public Assistance Manual regulations on residence?

A. Yes, it is a copy.

MR. GILHOOL: You can hold onto that.

May I have marked for admission into evidence as Plaintiffs' Exhibit 1 the residence regulations of the State Public Assistance Manual.

(Residence regulations of the State Public Assistance Manual marked Plaintiffs' Exhibit No. 1 for identification.)

BY MR. GILHOOL:

Q. May I call your attention to the last page of those regulations, Appendix 1, Reciprocal States.

Those are the 17 states with whom Pennsylvania has reciprocity agreements?

A. Yes.

Q. Would you explain how reciprocity operates?

A. We initiate a request to the other state as to whether (100) they will grant assistance to people from Pennsylvania in a form agreement which obligates them to provide for people from Pennsylvania if we in turn provide for people from this other state without regard to the length of their residence in the state.

We have in all of these 17 states taken the initiative and we regularly keep in contact with other states.

We have one in process right now with Kentucky.

BY JUDGE SHERIDAN:

Q. I notice that Delaware is one of these states. How would that work with respect to this plaintiff?

The testimony shows she came here in December from Delaware.

A. Delaware, we would grant assistance to a resident from Delaware without regard to the length of stay that the person—

Q. Why hasn't it been granted in this case?

MR. GILHOOL: May I call your attention—

JUDGE KALODNER: Will you let her answer Judge Sheridan's question?

MR. GILHOOL: Certainly, sir.

A. If you notice Delaware is in relation to blind.

Q. I see.

A. Delaware withdrew. We had a reciprocal agreement with Delaware but they withdrew.

(101) BY JUDGE KALODNER:

Q. You just said that you are now working out an agreement with Kentucky?

A. Yes.

Q. I thought you told us a few minutes ago that Kentucky has no residence requirement.

A. I know. Neither does New York but they are on here too.

We work out a reciprocal arrangement anyway with New York State because this permits us to waive our year's residence requirements. They are all right but we are not.

Q. Now, is there permissive legislation to enable you to do so?

A. Yes, it is written right into the law, this reciprocity.

BY MR. GILHOOL:

Q. Miss Davis, do you recognize this letter?

A. Yes.

MR. GILHOOL: May I ask that this be marked as Plaintiffs' Exhibit 2 and offer it in evidence.

(Copy of letter dated June 23rd, 1966, addressed to Mr. Arlin M. Adams, Secretary of Public Welfare, from John E. Hiland, Jr., Director, State of Delaware Department of Public Welfare marked Plaintiffs' Exhibit No. 2 for identification.)

BY MR. GILHOOL:

Q. What is that letter, Miss Davis?

(102) A. The letter is from the State of Delaware to the Secretary of Public Welfare concerning reciprocal agreements in Public Assistance.

Q. And how does—how did it affect the agreement between Delaware and Pennsylvania?

A. It resulted in our eliminating our—well, it cancelled the reciprocal agreement.

Q. Do reciprocal agreements and their state change often?

A. Not frequently.

Q. In 1966 how many new regulations, how many new copies of Appendix 1—

JUDGE KALODNER: Where does this help us? What difference does it make?

MR. GILHOOL: Your Honor, it goes precisely to the arbitrary and capricious operation of this statute.

JUDGE KALODNER: Why?

MR. GILHOOL: Because had plaintiffs chosen to come to Pennsylvania at a slightly different season they would have received assistance.

JUDGE KALODNER: Because another state changes its rules, that means that there must be an increase on the part of the Pennsylvania Legislature.

MR. GILHOOL: Yes, sir, the Pennsylvania State Legislature.

(103) JUDGE KALODNER: That's what makes horse races. That is your idea.

I don't agree.

BY MR. GILHOOL:

Q. How often did it change in the course of calendar 1966?

A. We had made three changes in 1966.

Q. Does Pennsylvania seek these reciprocal agreements?

A. We have initiated them in all instances. No other state has approached us.

Q. Why does the Commonwealth seek them?

A. Because it is required under the law. It is an obligation under the law.

Q. Do these reciprocal agreements cost the State money?

A. No, they balance out. Just about as many persons from Pennsylvania go to the other states as come from other states into Pennsylvania.

Q. May I call your attention to this list of 17 states?

A. Yes.

Q. Would you indicate which of these states provides grants that are lower than those of Pennsylvania Public Assistance, and which higher, and which the same?

A. Arkansas is lower; Delaware is lower; Georgia is lower; Hawaii is lower; Idaho about the same; Maine lower; Michigan and Minnesota are about the same; Mississippi would be lower.

(104) New Hampshire lower; New Jersey about the same, a little higher in some areas; New York very substantially higher; Rohode Island higher; South Carolina lower; Virgin Islands lower; Wisconsin about the same.

BY JUDGE SHERIDAN:

Q. Before you leave that, are any of those 2967 families rejected, are any of those included here?

A. No.

Q. They are outside—

A. They wouldn't be. They are rejected.

BY MR. GILHOOL:

Q. May I call your attention to Section 3154.12 of the Manual of Regulations on Residence.

The provisions of that regulation I guess speak for themselves. The first paragraph and the last and last but one paragraph—

A. Yes.

Q. Would you turn your attention to those paragraphs?

How many rejected applicants have been assisted to return to the state from whence they came under this regulation?

A. We have not kept statistics on that.

Q. Is this provision 3154.12 called to the attention of all rejected applicants?

(105) A. Yes, indeed.

MR. GILHOOL: I have no further questions.

BY JUDGE LORD:

Q. Miss Davis, I would like you to clarify something for me.

Going back to the figures that you gave us that would result if the residence requirements were eliminated—

A. Yes.

Q. I believe you said that the cost would be $1,637,500 to the State.

A. Yes.

Q. And $1,400,000 to the Federal Government?

A. Yes.

Q. Is that in addition to the present cost of the administration of public assistance?

A. Oh, yes.

Q. This is in addition?

A. This would be additional cost.

Q. In other words so that I am absolutely clear, if the residence requirements were eliminated the cost would increase to the Commonwealth by $1,637,000?

A. Right.

Q. That is on your projection?

A. That is right.

(106) Q. On your projection?

A. On our projection, yes.

JUDGE LORD: I see. All right.

BY JUDGE KALODNER:

Q. Is this the projection of the Department, or your own projection?

A. No, this is the projection of the Department. We have a unit engaged in this.

Q. But you have failed to persuade the Legislature?

A. Right.

MR. CASPER: I have no questions of this witness.

BY JUDGE SHERIDAN:

Q. Do I understand your testimony now that you have recommended to the Legislature one out of five years, but your testimony is that the agency, your agency thinks there ought to be no restriction?

A. Well, we would like to see no restriction, I am sure, but one of the handicaps is the other states that have residence requirements and on the whole I think Governor Lawrence back in his administration tried to sway the Governors into agreement of eliminating residence requirements entirely.

We are looking to the Federal Government, (107) really, to take some responsibility in this.

BY JUDGE KALODNER:

Q. Well, did he—.

A. This is part of the problem.

Q. All right, but you said Governor Lawrence proposed that to other states.

What was the premise of the proposal? Did he state it?

A. The elimination of the residence requirements.

Q. I know, but when he asked he must have given some reason for it.

A. They were proposing compact arrangements very much like our reciprocal agreements at this Governors Council, and Governor Lawrence's reply to this was that the compact agreements did not solve the problem, that the major thing with a mobile population was to remove residence requirements, that they no longer had the significance that they had.

It hampered people in their movement.

BY MR. GILHOOL:

Q. Do you recognize this letter?

A. Yes.

MR. GILHOOL: I should like to have marked as Plaintiffs' Exhibit 3 and offered into evidence the letter of Governor Lawrence to Governor

Rosellini, Chairman of the (108) Governors' Conference in 1959, precisely elaborating the governor's position as Your Honor has explored it.

(Copy of letter dated June 24, 1959, addressed to Honorable Albert D. Rosellini, Governor of Washington, Olympia, Washington, together with attachments, marked Plaintiffs' Exhibit No. 3 for identification.)

MR. GILHOOL: I have no further questions, Your Honors.

Thank you, Miss Davis.

(Witness excused.)

MR. GILHOOL: I call Stanley J. Brody to the stand.

STANLEY J. BRODY, sworn.

Direct Examination

BY MR. GILHOOL:

Q. Mr. Brody, what is your occupation?

A. I am a public welfare administrator.

Q. What position do you hold?

A. I am the Regional Director for the Southeast Region for the Department of Public Welfare.

JUDGE KALODNER: Keep your voice up, please.

(109) BY MR. GILHOOL:

Q. How long have you been Regional Director?

A. Approximately three years.

Q. What is your professional background?

A. I am a member of the Bar and I have both degrees in social work and law.

Q. Prior to your encumbency as Regional Director what positions did you hold?

A. I was Executive Secretary of the State and Local Welfare Commission, which is a State commission to repattern the delivery of welfare services in Pennsylvania.

Before that I was consultant to the Attorney General of the United States in the Office of Juvenile Delinquency.

Prior to that I was the editor of the Social Legislation Information Service which is a national service on social legislation.

I have also been a legislative analyst for the old Bureau of Public Assistance for the Federal Government.

Q. What are your duties as Regional Director of the Department of Public Welfare?

A. I coordinate the seven different programs the Department engages in in this five-county area.

Q. What does public assistance provide for the recipient (110) thereof?

A. Public Assistance provides basically three kinds of services.

One of course is the money grant service, the public assistance grant. Secondly, they provide social services in the way—to clients, and thirdly, they provide medical assistance services.

Q. With respect to the latter, Mr. Brody, would you describe the medical assistance provided under public assistance as such, and would you compare and

contrast that with other medical assistance programs administered by your department?

A. Our public assistance program really is two basic medical—two basic programs; one for people who are receiving money grants, who are on public assistance.

For them we have literally—I would prefer to call it subsidized medicine, but in essence it is a complete subsidization of the recipient so far as his medical needs are concerned.

We pay for his drugs, we pay for certain basic dental care, we pay for inpatient care, we pay for physician care in the home, and on an outpatient we do not pay for in the hospital at this point.

Q. As to that there is a residence requirement?

A. There is a residence requirement under the money grant (111) programs.

Q. What other medical assistance programs do you have?

A. The other medical assistance programs we have are for inpatient care. This roughly we use on an eligibility basis for the medically indigent.

A person would be medically indigent if there were a family of four and have an income of $4,000. That would give you a rough rule of thumb.

Q. As to that—

A. We would give 60 days of inpatient hospital care followed by 60 days after that of convalescent care in a nursing home.

Q. Is there a residence requirement for that program?

A. No, there is not.

Q. You mentioned social services that accompany public assistance, and that are available to recipients.

Would you describe them?

A. Within the administrative feasibility of an overworked staff our requirements are—what we would ask our employees to do, that—to help clients to live a—to a more complete existence in terms of getting training, educational training, and we do run educational programs.

Q. Would you describe some of them in particular?

A. For example, probably the best anti-poverty program in the City is run by the County Board of Assistance. We don't (112) make too much noise about it but we have 1200 recipients of public assistance who are functionally illiterate.

We are teaching them in cooperation with the Board of Education how to read and write.

We do that through a special incentive program which encourages them to attend these classes and many of them are now starting to graduate high school.

Q. Do you have a job training program?

A. We have also work training programs in conjunction with this program.

Q. What do recipients do with their children while they are attending either the literacy class or the job training?

A. We have tried to make arrangements for day care for them while they go into these job training programs or these educational programs.

Q. Will public assistance provide for these plans as well as the care of their children?

A. Yes.

Q. What particular job training programs are you associated with?

A. Do you mean within the Department itself?

Q. What kind of jobs?

A. Well, there are a variety of jobs; any kind of hospital, orderly job—

(113) Q. Licensed practical nurse?

A. Licensed practical nurse, for some purposes, yes; clerical jobs. For example, one of these girls works right in my office for half a day.

Q. Thank you. Given the residence requirement in the public assistance program, what ramifications does that have on other programs, public or private?

A. Well, for example, the Home for the Jewish Aged will qualify as a voluntary home, or any other voluntary home—I picked this one because I am intimately familiar with it, but will qualify its intake based on residence requirement since this is the way people would be funded in the home.

This is particularly true with almost every voluntary agency.

Q. Why does public assistance work such carry-over effect on other programs?

A. This is the basic support, you see, for the agency.

For example, the Stephen Smith Home is a home that services primarily Negro clients. It depends upon the public assistance grants in order to give the service.

Q. Does any other state or county program provide income maintenance for the indigent?

A. No.

Q. Is there any public provision, absent provision or income (114) maintenance for indigent newcomers?

A. The only possibility would be under a county program, if the county were to provide these services, and there is a statutory enabling act which would allow the county to do it. De facto it doesn't.

Q. De facto it doesn't?

A. No.

Q. Why doesn't it?

A. Well, I would say certainly in Philadelphia County it doesn't, and I don't—in my experience in going through almost every county in the state, generally speaking the position of the county commissioners and/or the local authorities is that this is an obligation they are not willing to accept.

Q. Have funds ever been appropriated to the counties—

BY JUDGE KALODNER:

Q. Public assistance programs were designed to do away with the old-fashioned poorhouse?

A. Yes.

Q. That was the very purpose?

A. Yes.

Q. To take it out of the hands of the counties?

A. That's right.

BY MR. GILHOOL:

Q. Mr. Brody, what are the characteristics of public (115) assistance recipients?

A. Well, the bulk of the public assistance recipients fall into what we call the ADC category. A small group, perhaps 10 percent, come into the old age assistance category; another 10 percent perhaps

in the blind category; another 10 percent or so in the disabled category, which takes you up to 30 percent.

You get a fill-in there of general assistance, but the bulk of your grants runs around into the ADC group, which would run at least 50 percent, perhaps a little more, of your total populations.

BY JUDGE KALODNER:

Q. Isn't the figure closer to two thirds than that?

A. I would think 60 percent is closer to that. I would have to consult the figures.

Q. I was familiar with the statistics a good many years ago inasmuch as I was Secretary of the Budget of Pennsylvania.

A. If you will recall old-age assistance used to take in a large number. That has dropped substantially because of the increase of Social Security, but the ADC category has steadily grown over the last 30 years.

BY MR. GILHOOL:

Q. What percentage of public assistance recipients are unemployable?

(116) A. This is a very subjective statement. Mr. Adams, Arlin Adams, had been the Secretary of Welfare.

BY JUDGE LORD:

Q. What is he doing now, by the way?

A. He is the Chancellor of the Bar, I think.

Q. Oh, yes.

A. Among other things, I suspect, but Mr. Adams and I had occasion to test this concept of employability.

Anybody the case worker thinks is employable must report to the Bureau of Employment Security periodically for jobs. We examined the statistics of it, knowing what was happening.

We challenged the Department of Labor and Industry. They said we were sending them unemployables.

Mr. Adams and I sat down at the Bainbridge office and looked at these people coming in and it was clear that they were unemployables, and we revised our definition of—our disabled definitions.

(117) As a result I would say today, for example, of the 115,000 people on public assistance in the City of Philadelphia, the County of Philadelphia—

BY JUDGE KALODNER:

Q. How many?

A. 115,000, I would estimate perhaps 5000 might be employable.

The Special Assistant to the President of the United States made a public statement a couple weeks ago which was well-recorded in the press in which he said of the—I don't know my universe on this, but my universe may be two or three million, that there were 5000—

BY MR. GILHOOL:

Q. 7.3 million.

A. 7.3 million, that perhaps there were 5000 who were employable.

Q. What is the average—

BY JUDGE KALODNER:

Q. In other words, the employment—the hard core is just unemployable?

A. That is correct.

BY MR. GILHOOL:

Q. What is the average length of time a recipient is receiving (118) public assistance?

A. About two years.

Q. In other words, receiving public assistance is rather a crisis matter?

A. That's right.

Q. People come and go?

A. They make other arrangements. It is really a crisis program.

Of course, it is more than that too because you have to remember that public assistance is really the most comprehensive program the state has to offer.

If you are mentally ill you need public assistance usually after you have been in the state hospital. Almost the only way you can get out of a state hospital is in terms of being supported.

If you have a problem in terms of children, this is —again comes in your medical problem, so public assistance in a comprehensive way really underlies your whole social fabric in terms of dealing with the crises people have in life.

Q. Are you saying without public assistance in many cases people faced with crisis would not be able to secure these other services as well?

A. That is correct.

(119) Q. How do Pennsylvania public assistance grants compare in money terms with those in other industrial states?

A. It depends upon the category.

Q. Industrial.

A. In aging and disabled we compare favorably.

JUDGE KALODNER: What does that have to do with the problem before us?

MR. GILHOOL: Your Honor—

JUDGE KALODNER: As to the adequacy or inadequacy of comparable payments?

MR. GILHOOL: Your Honor, it might well be, though I would argue to the contrary, that the state could say we have a legitimate interest in attempting to keep the poor out of the state, because we have a program of grants that is far in excess of any other state.

As I say, I would argue that is not permissible. I want to establish simply that Pennsylvania—

JUDGE KALODNER: That they have—

MR. GILHOOL: I think we want to establish the fact of whether Pennsylvania does or does not—

JUDGE KALODNER: Did you say that is a fact that should be taken into consideration?

MR. GILHOOL: One must accommodate eventual and fortuitous consideration.

(120) JUDGE KALODNER: I can't understand this.

MR. GILHOOL: Your Honor, is this one of those horse races where I can proceed with the question?

JUDGE KALODNER: Yes. I don't understand what you are trying to get to.

What difference does it make whether or not Pennsylvania grants are lower than any other state, or higher?

MR. GILHOOL: Your Honor, if they were higher possibly the state might be justified in attempting to keep people out.

If on the other hand they are not notably higher but are lower—

JUDGE LORD: I think, Mr. Gilhool, I must take issue with your formulation of that.

I don't believe that the state is trying to keep people out. I think the state is saying you can come in, but we have to have some kind of a reasonable regulation before we pay you public assistance.

MR. GILHOOL: Fine, Your Honor. The state is trying to keep them off public assistance, and they can do that either by foreclosing it to them when they come in, or not.

JUDGE LORD: All right.

MR. GILHOOL: That is the point.

(121) JUDGE KALODNER: Answer the question then.

THE WITNESS: As I pointed out, in the three categories of disabled, blind and old-age assistance, we have—we are comparable with other states.

When it comes to ADC, we are substantially lower than the states around us, the New England States, the Middle Atlantic States.

BY JUDGE KALODNER:

Q. ADC, is it?

A. Yes.

Q. You are talking about unemployment relief?

A. Public Assistance, ADC, Aid to Dependent Children.

Q. What about unemployment relief?

A. The general assistance category?

Q. Yes, the general assistance category.

A. In the general assistance categroy we are comparable and in some cases better.

BY MR. GILHOOL:

Q. How do our grants compare with those in New York?

A. We are radically lower.

Q. With those in Illinois?

A. Substantially lower.

Q. With those in Massachusetts?

A. Radically lower.

(122) BY JUDGE LORD:

Q. Have you made any—

BY JUDGE KALODNER:

Q. What about Southern States?

A. Radically higher.

BY JUDGE LORD:

Q. Have you made any inquiry into the state of the deficit in New York State as compared to the deficit in Pennsylvania?

A. In terms of its overall budget I would not want to qualify myself as a competent witness on this except that we have examined it, of course, and we take some great pride in the fact that we have managed, if the thrust of your question is that—how have we done in public assistance vis-a-vis New York State, we have been able to maintain our public assistance levels fairly well, but we think we have done this because, in the last eight years we have increased the health, the industrial health of Pennsylvania, and we have also, through these programs, helped people off public assistance in a constructive way.

MR. GILHOOL: I have no further questions.

BY JUDGE KALODNER:

Q. Do you have any familiarity with the state's fiscal operations?

A. Yes, sir.

(123) Q. All right, does Pennsylvania have a deficit now?

A. No, sir.

Q. I read in the paper that the Governor is talking about some $200 million in taxes.

A. I was answering your question, sir, as of now. In terms of the projected budget, yes. In terms of currently, we are probably running a small surplus, in terms of our '66-'67 budget.

It is the '67-'68 budget which will require additional taxation, if adopted by the legislature.

In other words, this is a projected budget which is proposed and is now under consideration.

MR. CASPER: I have no questions, Your Honors.

JUDGE LORD: I have nothing further.

JUDGE SHERIDAN: That's all.

MR. GILHOOL: Thank you, Mr. Brody.

I call Miss Florence Silverblatt.

(Witness excused.)

FLORENCE SILVERBLATT, sworn.

Direct Examination

BY MR. GILHOOL:

Q. Miss Silverblatt, what is your occupation?

(124) A. I am a social worker.

Q. What is your present position?

A. I am Director of the Social Services Division of the City of Philadelphia.

Q. How long have you been Director of the Social Services Division of the City of Philadelphia?

A. Seven years.

Q. How long have you been associated with the City Department of Public Welfare?

A. 15 years.

Q. What is the distinction between the City Department of Public Welfare and the Commonwealth Department of Public Welfare?

A. The Commonwealth Department of Public Welfare provides public assistance as you have just heard described by the two last witnesses.

The City of Philadelphia is the County Institution District under the supervision of the Commonwealth of Pennsylvania, but actually represents the City of Philadelphia which is a city and county co-terminus,

and provides services to dependent and neglected children of Philadelphia.

Q. What kind of services do you provide to dependent and neglected children?

A. We provide the basic services of —all the services that (125) will promote the health and welfare of dependent and neglected children, and specifically we provide emergency shelter case, emergency and temporary foster home care, basic foster home and institutional care, home-maker services and many services to strengthen family life.

Q. Do you offer any grants for income maintenance?

A. No.

Q. What services do you offer indigent newcomers?

A. Newcomers?

Q. Yes.

A. Are you speaking of the person coming into the city for the first time?

Q. Yes.

A. Well, the County Institution District of Philadelphia, or their allied departments, operate under the County Institution District Law.

Q. Yes.

A. And also under the Philadelphia City Charter.

Now, the Philadelphia Charter provides services to children and their families residing in Philadelphia County.

However, it does provide for flexibility in the provision of care when it will prevent the separation of children from their parents.

(126) Q. You have mentioned foster care. Suppose a young woman came to the department and said

she wanted to place her five children in foster care until next December.

What would you do?

A. I would—a request like that is not taken very lightly because basically we know from many years of child welfare experience that whenever possible children should be kept in their own home.

We would have to know why a mother is requesting the placing of her children.

Q. Suppose the mother wanted to go to work?

A. Well, again, this goes right back to the White House Conference on Children, that children should not be removed from their parents for financial reasons and that children should not be removed except for compelling reasons.

Now, there are times when there are no parents to provide for the children or there are other times when children are neglected. We must protect the children, but we do look very carefully as to why children are separated from their parents.

Q. So is it strong public policy of your department to keep the family together?

A. Yes.

(127) BY JUDGE LORD:

Q. Let me ask you this, though. Suppose the mother has no income at all and suppose the mother is about to be evicted from where the mother and the children are living together as a family, and the mother finally decides that well, there is only one thing to do, there is only one thing left and that is to go to work and comes to you and says, "Will you place my children?"

A. Well, Your Honor, our first question would be why she could not have emergency or public assistance or temporary public assistance.

Q. From where?

A. From the Office of Public Assistance.

Q. Pennsylvania Public Assistance?

A. Yes.

Q. But she says, I have got the answer to this, "They tell me I have not been here for a year."

A. Then we would have very grave question in providing for placement for the children, not that we wouldn't have to keep these children on an emergency basis if they had no shelter, but we would argue this very strenuously because of the fact that—there are two facts, but the first fact is that this is not providing for the best welfare of the child, for the mother to be separated.

(128) Q. What do you do with them if they have got no money, no food, no shelter?

A. Well—

Q. What do you say? "It is better you stay with your mother"?

A. No, but, Your Honor, I think the question that is being raised by you is the very question that is the issue here.

Q. That is exactly why I raised it. I think we might better get to that.

A. May I speak of this in a little more detail?

I am saying to you that we would not in our department allow any child to go without shelter, and we would certainly take those children in, but I am saying that it is a very bad policy from the point of view of human value.

Let me tell you, financially when we are talking about these programs—

BY JUDGE KALODNER:

Q. You do give them help, though? You say it is a bad policy but in this particular case we have before us where the lady has five children, all of very tender age, you would take those children and place them in foster homes, wouldn't you?

A. We would, temporarily.

BY MR. GILHOOL:

Q. Until she satisfied the residence requirements?

(129) A. Yes.

Q. In this case it would be next December, so let's have a concrete case.

You would place the children in a foster home until next December?

A. We would have to, Your Honor.

Q. Miss Silverblatt, do you have available foster homes this day?

A. That is a very good question. You are making me wash my linen in public.

We have—serve 6200 children in this city. We have 711 foster homes. We purchase care from 25 voluntary agencies. We have children in our two centers awaiting care.

They should be there 90 days. They sometimes wait two years in order to find resources for these children.

Q. You speak of two centers. Where are they?

A. One center is called the Stenton Child Care Center, located in Germantown, which provides emergency care for children from three to eight. The capacity is 135. At present we have 168 there.

We have another center on Callowhill Street for infants up to three years of age. The capacity is 45. We have 47 there.

(130) Q. When do you place children in these homes?

A. Whenever there is an emergency in the family.

Q. And temporary foster homes are not available?

A. And temporary foster homes are not available.

Q. What is the average length of time that children wait in those homes for placement in private foster homes?

A. Six months is our average.

MR. GILHOOL: That's all.

Mr. Casper?

MR. CASPER: I have no questions.

MR. GILHOOL: I have no further questions. Thank you, Miss Silverblatt.

(Witness excused.)

JUDGE LORD: Mr. Gilhool, if we were to declare this section of the Act unconstitutional, that is the residency requirement, and I ask that question—

MR. GILHOOL: Yes, sir. I understand. It is a hypothetical.

JUDGE LORD: —containing no implication whatsoever of what would happen, would the entire Act fall?

MR. GILHOOL: No, sir. The Act is—the provisions of the Act are severable.

(131) JUDGE LORD: There is a severability provision in the Act?

MR. GILHOOL: Yes, sir. Your Honor, I should welcome the opportunity to present argument to the Court after further brief, if Your Honor finds it appropriate and convenient to set some date over the next little while.

JUDGE SHERIDAN: Isn't the Commonwealth going to present anything on the reasonableness of this one-year requirement?

MR. CASPER: If it please Your Honors—

JUDGE KALODNER: Come up to the bar of the Court.

MR. CASPER: At the hearing we had in this case before, you may recall the questioning. It was asked of Mr. Gilhool whether the quantity of the durational residence was in question.

His position was—it was an all-or-nothing position. Durational residence requirements, period, were unconstitutional, so we have positioned our counter-argument on that basis.

JUDGE SHERIDAN: Just because he takes that position? Suppose we don't think that?

MR. CASPER: Subject to the argument in our brief, Your Honor, where we cited a number of arguments in (132) support of the reasonableness of specifically the one-year period, we made reference if you may recall to the provisions in the Social Security Act which allow a residence period of up to one year.

We made reference to the tie-in between the one year and fiscal budgeting.

Those are arguments we addressed ourselves to.

JUDGE KALODNER: Miss Davis, who, is presently employed by the Department, and there is no reason to question—she seems a very knowledgeable witness, and she said that the total cost to the state would be $1,637,000 per year if the residence requirement was waived, and that compares to an annual outlay of some $336,500,000.

MR. CASPER: Yes, Your Honor.

JUDGE KALODNER: Which is an infinitesimal fraction.

JUDGE LORD: Less than one-half of 1 per cent.

MR. CASPER: Yes, Your Honor.

JUDGE KALODNER: That is in essence the state's position, and the department having to do with the situation has recommended to the Legislature that the provision be repealed because it would be of little cost, minute cost, to the state.

(133) Judge Lord has said it is less than one-half of 1 per cent.

MR. CASPER: I believe so, Your Honor, but these have been proposals that have been put to the Legislature not just once—

JUDGE KALODNER: Don't we have to decide whether or not this provision in the law is a reasonable one?

MR. CASPER: In one sense, yes, Your Honor.

JUDGE KALODNER: What other sense is there?

MR. CASPER: In two phases. Mr. Gilhool's first argument is to say that no residence requirement at all can be.

JUDGE SHERIDAN: Suppose we reject that?

MR. CASPER: Then the Court would have to face the question of what kind of residence requirement.

JUDGE SHERIDAN: You have submitted no evidence.

MR. CASPER: Your Honor, I say that we, in our brief, addressed ourselves to that, giving some argument in support of the present one year's requirement.

JUDGE SHERIDAN: What about the facts? How do we know about the budget other than what we have heard today?

This is the first we have heard.

(134) MR. CASPER: If I may say so, Your Honor, I am in a position of representing the Commonwealth in a case where the constitutionality of a state statute is being challenged, a statute passed by the Pennsylvania Legislature.

The Department of Public Welfare as part of the Executive may or may not agree with what the Legislature has enacted into law.

At the moment as I conceive my job to be, I have to try and put before Your Honors what I can to sustain the legality of the law as it is on the books, irre-

spective of what the department may have to say with respect to the reasonableness of the test that is presently adopted, or some modification thereof. That is the law at the moment.

JUDGE LORD: It is, at the moment.

MR. CASPER: Yes, sir, but I have not been briefed nor do I know of any machinery where I could be briefed by the gentlemen of the Legislature who are responsible for this particular policy.

If I were to produce evidence—

JUDGE KALODNER: You might be briefed on the legislative position, that of the Department.

JUDGE LORD: You have given us no facts at all.

MR. CASPER: No, Your Honor. I don't see how (135) I can. If I could—

JUDGE LORD: The plaintiff did. The plaintiff gave us facts. The plaintiff gave us facts showing that the increase, if the residence requirements were lifted, would be only ½ of 1 per cent of an increase over the total budget.

The plaintiff has presented evidence here that there would be no budgetary problems; in fact, the budgetary problems or the administrative problems would be less if the residence requirements were eliminated.

The Commonwealth has given us no facts whatsoever.

MR. CASPER: If I may say so, Your Honor, the witnesses that Mr. Gilhool called are the very people that I would rely on for my facts. The facts would be exactly the same.

JUDGE LORD: Splendid, then.

MR. CASPER: But I am saying, if I may say this, these are the experts from the Department of Public Welfare. The experts of the Department of Public Welfare and the Department is not necessarily responsible for the decision which is reflected in law.

That is my problem in this situation. I have no indication from any source that the facts would be—the (136) Legislature might come forward with different facts.

JUDGE SHERIDAN: You have argued in your brief that for budgetary reasons this is reasonable.

MR. CASPER: Yes, Your Honor.

JUDGE SHERIDAN: In view of this evidence today do you withdraw that argument?

MR. CASPER: Certainly not. I would say to Your Honor that I would have to take a position that, however, whatever it would be in percentage, that one million and some dollars is something to be reckoned with, and if the Legislature wants to use that money for some other purpose on their priority scale, that they have the power to do it, although other people might disagree with it. That is the position.

JUDGE KALODNER: Don't they have to reasonably do it?

MR. CASPER: Reasonably, within a very broad discretion, Your Honor.

In other words, it is not a question of having a large fund of monies available and somebody saying do you

have anything like a reasonable claim? If so, we will grant it to you.

It is a matter of not enough money being (137) available for all the needs that there are, even in terms of the levels of public assistance of all categories, so therefore even one million dollars is very important. It is not a question of going to a reasonable place.

JUDGE KALODNER: Do you know how much the budget of Pennsylvania is?

MR. CASPER: It is very considerable, Your Honor, but I will still say that one million dollars may also be considerable in terms of where it is allocated, and this is a question of—in which the Legislature should be given last discretion.

JUDGE LORD: Suppose it was $50?

MR. CASPER: We would be reduced, I confess, to de minimis, Your Honor.

JUDGE LORD: All right.

JUDGE KALODNER: You have no evidence to offer? The Commonwealth has no evidence to offer?

MR. CASPER: No, Your Honor.

JUDGE LORD: All right, we have it on the record. Mr. Gilhool, do you wish to file a further brief?

MR. GILHOOL: Yes, Your Honor. I do.

JUDGE LORD: Within what time?

MR. GILHOOL: Ten days at the very longest, (138) Your Honor.

JUDGE LORD: Very good. Does the Commonwealth wish to file another brief?

MR. CASPER: If at all we would like to file it after Mr. Gilhool submits his to us.

JUDGE LORD: We will give you ten days from the date on which you receive Mr. Gilhool's brief. That does not mean ten days from today. If he gets his in in five days, you have 15 days from today.

MR. CASPER: I understand. Thank you very much.

JUDGE LORD: Then if we determine that we want oral argument we will so advise you.

MR. GILHOOL: Thank you, Your Honor. My request stands of record.

JUDGE SHERIDAN: You want oral argument, do you?

MR. GILHOOL: Yes, sir.

JUDGE LORD: How about if we think your brief is so abundantly clear that—

MR. GILHOOL: Your Honor, I have no desire to burden you further.

JUDGE LORD: I think we understand your position.

(Adjournment at 12:25 p.m.)

In the United States District Court for the Eastern District of Pennsylvania

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(Title Omitted in Printing)

VIII.

MOTION FOR DETERMINATION THAT CLASS ACTION MAY BE MAINTAINED

Pursuant to Fed. R. Civ. P. 23, plaintiffs move this Court to determine by order that the action herein brought as a class action to be so maintained, on the following grounds:

1. Plaintiffs are members of that class of persons, citizens of the United States and residents of the Commonwealth of Pennsylvania, who are entitled to public assistance except that they have not resided in Pennsylvania during the immediately preceding one year.

2. The persons constituting the class are so numerous as to make it impractical to bring them all before this Court.

3. There are questions of law common to the class and the claims of plaintiffs here are typical of the claims of the class.

4. Plaintiffs fairly and adequately represent the class and will fairly and adequately present its interest.

5. Defendants have refused public assistance on grounds applicable to the class, namely, the provisions of the Public Assistance Law of the Commonwealth of Pennsylvania, Act of June 24, 1937, P. L. 2501, Secs. 9 (a) (2) and 9 (d), as amended, 62 Purd. Stat. Sec. 2508.1 (6) which require residence in Pennsylvania for one year immediately preceding application as a condition of public assistance, thereby making appropriate final injunctive and declaratory relief with respect to the class as a whole.

Respectfully submitted,

Thomas K. Gilhool
Consumer's Advocate
Community Legal Services, Inc.
313 South Juniper Street
Philadelphia, Pennsylvania
Attorney for Plaintiffs

(Affidavit of service omitted in printing.)

In the United States District Court for the Eastern District of Pennsylvania

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(Title Omitted in Printing)

IX.

ORDER

And Now, this 31st day of May, 1967, pursuant to Fed. R. Civ. P. 23, it is determined and hereby Ordered that the above mentioned action is to be maintained as a class action on behalf of that class of persons, citizens of the United States and residents of the Commonwealth of Pennsylvania, who are entitled to public assistance except that they have not resided in Pennsylvania during the immediately preceding one year.

By the Court:
(s) Joseph S. Lord, III
J.

In the United States District Court for the Eastern District of Pennsylvania

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(Title Omitted in Printing)

X.

FINDINGS OF FACT, DISCUSSION AND CONCLUSIONS OF LAW

Before: Harry E. Kalodner, Circuit Judge, and Michael H. Sheridan and Joseph S. Lord, III, District Judges.

By: Joseph S. Lord, III, District Judge.

FINDINGS OF FACT

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1. Plaintiffs are Juanita Smith, individually and, by her, her minor children, John Smith, Tabitha Miller, Sophia Paynter, William Paynter, and Voncell Paynter.

2. Defendants, with the exception of William C. Sennett, Attorney General of the Commonwealth of Pennsylvania, are variously charged with the powers and duties of administering public assistance, determining the eligibility of all applicants, superintending the public assistance program, and establish-

ing rules, regulations, and standards for administration by County Boards of Assistance.

3. The Act of June 24, 1937, P. L. 2051, §§9(a)(2) and 9(d), as amended, 62 Purd. Stat. §2598.1(6), provides that assistance shall be granted only to or in behalf of a resident of Pennsylvania who has resided therein for at least one year immediately preceding the date of application.

4. Plaintiff Juanita Smith resided in Philadelphia, Pennsylvania until 1959 and attended public schools in Philadelphia. From 1959 to December 1966, plaintiff Juanita Smith and other plaintiffs as they were born resided in the State of Delaware. Since the second week of December, 1966, plaintiffs have resided at 2859 Amber Street, Philadelphia, Pennsylvania.

5. Plaintiffs are now and were at the time of the institution of this suit citizens of the United States.

6. Plaintiffs intend to reside permanently in Pennsylvania.

7. On February 20, 1967, plaintiffs made application for public assistance and that day received a grant of $115.00.

8. A second grant in the same amount was received two weeks later on March 10, 1967.

9. On March 13, 1967, plaintiff Juanita Smith was informed by the County Board of Assistance that assistance to her and her children would be terminated.

10. Assistance to plaintiffs was terminated solely because they did not satisfy the statutory requirement of one year's residence immediately preceding their application.

11. No alternative resources, either from public programs or private agencies, exist to provide financial assistance to maintain plaintiffs here.

12. Plaintiffs are faced with a choice of remaining in Pennsylvania with no income to maintain themselves, separating the family by placing the children in foster home care, or returning to Delaware.

13. Plaintiffs are suffering and will suffer immediate, certain, great and irreparable injury from termination of public assistance.

14. If preliminarily enjoined from refusing to continue public assistance to plaintiffs, defendants will suffer negligible injury.

DISCUSSION

Requisite to the granting of a preliminary injunction is a showing that the plaintiff will suffer irreparable injury and a balancing of the "conveniences of the parties and possible injuries to them according as they may be affected by the granting or withholding of the injunction." Yakus v. United States, 321 U. S. 414, 440 (1944); Joseph Bancroft & Sons Co. v. Shelly Knitting Mills, Inc., 268 F. 2d 569, 574 (C. A. 3, 1959). We have found that plaintiffs will suffer irreparable injury. On the other hand, it is obvious that any injury to the Commonwealth would be *de minimis*. Thus, as to this essential, the balance is heavily in favor of the plaintiffs.

There are on the record here serious and substantial questions[1] of constitutional dimension, *inter alia*, as to whether the one-year residence requirement in the Pennsylvania Act of June 24, 1937 is a reasonable classification.[2]

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the parties and the subject matter.

2. Plaintiffs have raised serious and substantial issues concerning the constitutionality of the Pennsylvania Act of June 24, 1937, P. L. 2051, §§9(a), (2) and 9 (d), as amended.

3. The record presents serious and substantial questions of constitutional dimension.

4. Plaintiffs will suffer imminent and irreparable harm if preliminary relief is withheld.

5. Any injury to defendants as a result of the granting of preliminary relief will be negligible.

6. Plaintiffs are entitled to a preliminary injunction as prayed.

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[1] Railroad Yardmasters of America v. Pennsylvania Railroad Company, 224 F. 2d 226, 229 (C.A. 3, 1955).

[2] Carrington v. Rash, 380 U.S. 89, 93 (1965); McLaughlin v. Florida, 379 U.S. 184, 190 (1964).

DECREE

1. And Now, June 1, 1967, defendants are preliminarily enjoined from enforcing sections 9 (a) (2) and 9 (d) of the Act of June 24, 1937, P. L. 2051, as amended, and from withholding relief benefits from plaintiffs because of the terms of those sections.

2. This preliminary injunction shall not be construed to extend to any person other than the plaintiffs set forth in Finding of Fact No. 1:

By the Court
Joseph S. Lord, III
J.

In the United States District Court for the Eastern District of Pennsylvania

XI.

AFFIDAVITS

(1) AFFIDAVIT OF JOSE FOSTER

Commonwealth of Pennsylvania
County of Philadelphia, ss:

Jose Foster, being first duly sworn, on oath, deposes and says:

1. That she is applicant for intervention as plaintiff in the present action, and plaintiff in the complaint attached to said application, and the mother of four minor children, by her, applicant-plaintiffs in the present action.

2. That neither she nor her children have any income whatever.

3. That with her four children she presently shares a six room house, three bedrooms and one bath, with her sister and brother-in-law and their six minor children.

4. That all three adults and ten children share the same table, supplied only by her brother-in-law's limited income.

5. That she has been placed by medical advis[c]e upon a special non-salt diet because of her high blood pressure, which diet alone requires special expenditures on food.

6. That she is under medical care requiring frequent visits to Temple University Hospital but that without the necessary money for transportation she has not been able to keep many of these appointments.

7. That she has applied for public assistance and with her children is in immediate and irrevocable need of public assistance, as demonstrated by the fact that she is eligible therefor and fully entitled to receive it except that, with her children, she has not resided continuously in Pennsylvania for one year immediately preceding her application for public assistance.

7. That she and her children are suffering and will suffer immediate and irreparable injury from the denial of public assistance.

(s) Jose Foster
Jose Foster

(Jurat omitted in printing)

(2) AFFIDAVIT OF LOUISE THOMPSON

Commonwealth of Pennsylvania
County of Philadelphia, ss:

Louise Thompson, being first duly sworn, on oath, deposes and says:

1. That with her husband, Howard Thompson, and six children, aged 12, 11, 9, 7, 4 and 2 years, she resides at 2143 North Newkirk Street, Philadelphia, Pennsylvania.

2. That since August 28, 1967, her sister, Joe Foster, and her four children have lived with her and her family, sharing her table and her husband's income.

3. That the house at 2143 North Newkirk Street has only three bedrooms and one bath and is thus overcrowded by the presence of three adults and ten children.

4. That her family's income ranges between $80 and $90 per week because of seasonal variations in her husband's work.

5. That her family's gas bill is one and one-half months in arrears, that a shut-off notice has been received from the Gas Works, that on November 6, 1967 an employee of the Gas Works appeared to turn the gas off, refrained from doing so only because she was not at home, and promised to return within the week.

6. That her family's telephone bill is two months in arrears.

7. That her family has no income or savings from which to pay the overdue bills.

8. That the monthly rent of $59.50, exclusive of utilities, is due November 15, 1967 and that if that expense is to be met at all, it must be met out of next week's income, as must the food and other necessary daily expenses.

9. That her family's income is insufficient to support three adults and ten children at a minimum standard of health and dignity.

10. That she has been under treatment at Temple University Hospital for a nervous condition which condition has been aggravated by the present crowded and lean circumstances.

11. That one of her children, an 11 year old son who is not in school, is retarded and disturbed and that his condition is aggravated by the crowded and lean circumstances.

12. That she and her family are suffering and will continue to suffer immediate and irreparable injury from the denial of public assistance to her sister and her sister's family.

(s) Louise Thompson
Louise Thompson

(Jurat omitted in printing.)

In the United States District Court for the Eastern District of Pennsylvania

Civil Action No. 42419

Juanita Smith, individually, and by her, her minor children, John Smith, Tabitha Miller, Sophia Paynter, William Paynter, Voncell Paynter, 2859 Amber Street, Philadelphia, Pennsylvania; on behalf of themselves and all others similarly situated,

Plaintiffs

v.

Roger A. Reynolds, Mayer I. Blum, Herbert R. Cain, Jr., Katherine M. Kallick, Rosalie Klein, Alfred J. Laupheimer, Edward O'Malley, Jr., Norman Silverman, Julia L. Rubel, constituting the Philadelphia County Board of Assistance, William P. Sailer, its Executive Director, 1400 Spring Garden Street, Philadelphia, Pennsylvania; Thomas W. Georges, Jr., Secretary of the Department of Public Welfare of the Commonwealth of Pennsylvania Health and Welfare Building, Harrisburg, Pennsylvania; William C. Sennett, Attorney General of the Commonwealth of Pennsylvania,

Defendants

Jose Foster, individually, and by her, her minor children, Jeanette Foster, Annie Bea Foster, William Foster, Frances Foster, 2143 North Newkirk Street, Philadelphia, Pennsylvania

Applicants for Intervention as Plaintiffs

XII.

ORDER

And Now, November 14, 1967, upon the motion of Jose Foster, individually, and by her, her minor children, Jeanette Foster, Annie Bea Foster, William Foster and Frances Foster, for leave to intervene as plaintiffs in this action, it is Ordered that said applicants be and hereby are granted leave to intervene as plaintiffs in this action.

Joseph S. Lord, III.
J.

In The United States District Court For
The Eastern District of Pennsylvania

(Title Omitted in Printing)

XIII.

ORDER

Whereas, in the above titled action it appears by verified complaint and affidavits that a temporary restraining order preliminary to hearing upon motion for a preliminary injunction should issue, without notice and a hearing, because immediate and irreparable injury, loss and damage will result to applicants for intervention as plaintiffs, Jose Foster and her four minor children, before notice can be served and a hearing had thereon, in that defendants have denied public assistance to applicant-plaintiffs and left them destitute and without income to support and maintain themselves.

Notice and a hearing before entering a temporary restraining order should not be required because time and the immediate jeopardy of applicant-plaintiffs do not permit such a hearing.

Now, therefore, on motion of the applicant-plaintiffs,

It is ordered that defendants, each of them, their agents, servants and employees, and all persons act-

ing by, through or under them or either of them or by or through their order be, and they are hereby, restrained from denying public assistance to applicant-plaintiffs Jose Foster and her four minor children solely because they have not resided continuously in Pennsylvania during the year immediately preceding their application for public assistance.

Issued at 2:20 o'clock p.m. this 14th day of November, 1967.

Joseph S. Lord, III.
J.

In The United States District Court For.
The Eastern District of Pennsylvania

Civil Action No. 42419

Juanita Smith, individually, and by her, her minor children, John Smith, Tabitha Miller, Sophia Paynter, William Paynter, Voncell Paynter, on behalf of themselves and all others similarly situated

vs.

Roger A. Reynolds, Mayer I. Blum, Herbert R. Cain, Jr., Katherine M. Kallick, Rosalie Klein, Alfred J. Laupheimer, Edward O'Malley, Jr., Norman Silverman, Julia L. Rubel, constituting the Philadelphia County Board of Assistance, William P. Sailer, its Executive Director; Max D. Rosenn, Secretary of the Department of Public Welfare of the Commonwealth of Pennsylvania; William C. Sennett, Attorney General of the Commonwealth of Pennsylvania

XIV.
OPINIONS OF THE COURT

OPINION

Before: Harry E. Kalodner, *Circuit Judge,* and Michael H. Sheridan, and Joseph S. Lord, III, *District Judges.*

By: Joseph S. Lord, III, *District Judge.*

This class action challenges the constitutional validity of a Pennsylvania statutory provision which requires applicants for public welfare to have resided in the State for a period of one year immediately preceding the date of application for assistance. The members of the class are citizens of the United States and bona fide residents of Pennsylvania who would otherwise be qualified for public assistance but for the fact that they have not resided in Pennsylvania for a period of one year. We hold that the residence requirement, as presently administered, constitutes a denial of "equal protection of the laws" to members of the class, and that accordingly, Section 432 (6) of the "Public Welfare Code," Act of June 13, 1967 P. L. ..... (Act No. 21)[1] is void and may no longer be enforced.

We are aided in our conclusion by full evidentiary hearings. Plaintiffs' evidence showed that the requirement of one year's residence as a condition to the receipt of public assistance has no logical basis and is wholly arbitrary in its application to needy residents of the Commonwealth. The Attorney General of Pennsylvania, far from disputing this evidence, openly embraced plaintiffs' proofs, adopting the testimony of the expert witnesses who were produced, while introducing no evidence of his own.[2]

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[1] At the time suit was instituted, the identical provisions were contained in Sections 9(a)(2) and 9(d) of the Act of June 24, 1937, as amended, 62 Purdon's Pa. Stat., Section 2508.1(6).

[2] The Deputy Attorney General stated for the record at the conclusion of the second hearing: "If I may say so, Your Honor, the witnesses that Mr. Gilhool [plaintiffs'

(1) The one-year residence requirement does not necessarily prevent migration to the State of impoverished individuals, nor would the abolition of the requirement enhance the attractiveness of the Commonwealth to such persons. Thus, there would be no noticeable increase in the influx of newcomers, poor and otherwise, if the requirement were deleted.

(2) Those persons who do come to Pennsylvania and find themselves in need of public assistance within the first year of their arrival do not, to any significant extent, emigrate to the State for the purpose of obtaining such aid. Although the fact that they may not at present obtain welfare benefits may tend to deter or discourage migration to the State, there is concededly no competent evidence that it does so in fact, nor is there evidence that newcomers, once arrived, depart once they discover their subordinate status. Those who come into the State (and later find themselves in need of public assistance) do so for reasons wholly unrelated to the incidental benefits of public welfare which might be available to them. In most instances, they come to accept or seek employment in the State, to rejoin or join family relations, or for health reasons. Seeking new opportunities or established contacts, they find themselves temporarily in need of public assistance; they apply for such help, and it is denied to them.

(3) The cost to the Commonwealth of providing public assistance to those to whom it is now refused

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counsel] called are the very people that I would rely on for my facts. The facts would be exactly the same." N.T. 135.

because they have not been residents of the State for at least one year would be an insignificant portion of the present welfare budget—about one half of one per cent—and half of this amount would be absorbed by the Federal Government.

(4) Administrative costs and budgetary problems would actually be significantly decreased if the residence requirement were abolished; the necessity of screening and investigating applicants in this respect would be eliminated and the savings to the Department of Public Welfare in time and money would be substantial.

(5) The Commonwealth can ascribe no purpose at all to the distinction made by the Statute between residents who have lived in the State for over one year and residents who have not. The Attorney General's position is simply that the Legislature may allocate the State's resources in any way it wishes, and that it may discriminate freely among residents in the matter of public welfare benefits except with respect to the applicant's race, religion, or sex. Any other distinction or classification is permissible, argues the Attorney General, since the Legislature has the uncontrolled discretion to spend its money on whichever of its residents it chooses to favor.

It is elementary constitutional doctrine that the Equal Protection Clause of the Fourteenth Amendment prohibits a State or instrumentalities of the State from invidious discrimination among its citizenry. Reitman v. Mulkey, 387 U. S. 369. There is, of course, no constitutional right to receive public welfare any more than there is a constitutional right

to public education or even public police protection. However, if the State chooses to provide such public benefits, privileges, and prerogatives, it cannot arbitrarily exclude a segment of the resident population from their enjoyment. It is for this reason that classification in State statutes which purport to exclude from coverage one or more classes of individuals who would otherwise qualify for the advantages and opportunities conferred by the Legislature must be examined in order to determine whether there is any legitimate purpose for the distinction; whether an important and constitutionally cognizable State interest inheres in the classification, or whether on the other hand, the exclusion is purely arbitrary. Loving v. Virginia, 388 U. S. 1 (1967); Carrington v. Rash, 380 U. S. 89, 93 (1965); McLaughlin v. Florida, 379 U. S. 184, 1960 (1964). If the distinction is arbitrary, then the statute deprives the citizens so excluded of equal protection of the State's laws and of the benefits which those laws may impart. A discrimination without rational basis and without legitimate purpose or function is inherently invidious, and hence constitutionally interdicted.

In the context of the present case, we are totally at a loss to discern what purpose, if any, the Pennsylvania Legislature has ascribed to the one year residence requirement. To require a period of one year's residence as a condition to the receipt of public assistance results in the division of Pennsylvania residents into two classes: those who have lived in the State for one year and those who have lived in the State for less than one year. Such a distinction has no apparent purpose. See Green v. Department of Pub-

lic Welfare, 270 F. Supp. 173 (Del. 1967).[3] The Attorney General does not, of course, contend that its purpose is to erect a barrier against the movement of indigent persons into the State or to effect their prompt departure after they have gotten there and begun to realize the disadvantages of second-class citizenship. Such a purpose would be patently improper and its implementation plainly impermissible. The right to travel freely without deterrence is inherent in the notion of a unified nation, and no State may exclude citizens migrating from other States, whatever the reason for the migration. Edwards v. California, 314 U. S. 160 (1941); United States v. Guest, 383 U. S. 745 (1966). In any event, the proof mutually accepted by both sides in this case is that deletion of the residence requirement would not result in an influx of destitute relief-seekers.

Nor is there any contention that the residence condition enhances the administrative effectiveness of the Public Assistance Act. To the contrary, all of the evidence is to the effect that many of the burdensome budgetary and administrative problems which are currently encountered by welfare officials in the conduct of the public assistance program would be substantially alleviated by the removal of this bottleneck in the processing of applicants. Moreover, the added cost of the Commonwealth of helping the now excluded class would be relatively insignificant. Needless

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[3] See also Thompson v. Shapiro, 270 F. Supp. 331 (Conn. 1967) (presently on appeal to the United States Supreme Court) Ramos v. Health & Social Services Bd., F. Supp. (Wis. 1967) Harrell v. Tobriner, F. Supp. (D.C. 1967).

to say, there would be some increase in cost. It is axiomatic that Pennsylvania does save some money now by excluding residents of less than one year. But the constitutional test of equal protection is not satisfied by considerations of minimal financial expediency alone. To be sure, the State may reduce or even eliminate entirely welfare payments if it chooses to conserve resources in this fashion; it may turn all beggars from its doors. But it may not arbitrarily turn away some who are in need while bestowing its charitable favors on others. There must be some otherwise legitimate purpose for excluding members of the class who are in fact deprived of the protection and privileges of existing laws. It is not enough to say that the class is excluded because money is saved.

Needy newcomers are no less needy because they are newly arrived. They are no less residents of the State because they have only lately begun to reside there. And they are no less entitled to enjoy the public welfare benefits of which every needy resident of Pennsylvania may partake simply because they have experienced their critical need soon after migrating to their new home.

We do not seek to substitute our judgment for that of the Pennsylvania Legislature. We merely find as an indisputable conclusion of fact, as well as of law, that the Legislature itself has ascribed no proper purpose to the one-year classification. If the classification is without purpose, it is arbitrary *per se* and offends the Equal Protection Clause.

The Pennsylvania residence requirement constitutes a manifest violation of the Equal Protection Clause;

accordingly, the Commonwealth will be enjoined from its further enforcement.

(s) Joseph S. Lord, III

DECREE

And Now, this 18th day of December 1967, it is Ordered and Decreed that:

(1) Defendants are permanently enjoined from enforcing Section 432 (6) of the "Public Welfare Code," Act of June 13, 1967, P. L. (Act No. 21), and from withholding relief benefits from plaintiffs because of the terms of that section;

(2) The enforcement of this injunction is stayed pending prompt application to the Supreme Court for such further stay as that Court deems proper, pending appeal, Provided that a notice of appeal is filed within the time and in the manner prescribed by law;

(3) The preliminary injunction entered on June 1, 1967, respecting the named individual plaintiffs and extended to the named intervening plaintiffs on November 14, 1967, is contined in force pending the final disposition of this permanent injunction.

By the Court
Joseph S. Lord, III.
J.
Michael H. Sheridan
J.

Sheridan, *District Judge*, concurring.

I concur in holding that the Pennsylvania one-year residence requirement violates the Equal Protection Clause, and must be enjoined from further enforcement. I do not believe that any and all time limitations would be constitutionally interdicted. Rather, I am not convinced that on the present record a rational basis or legitimate purpose can be found in the budget-making function of the Legislature. The record reveals no other basis or purpose which would justify a one-year residence requirement in this kind of legislation.

Michael H. Sheridan

(s) Kalodner

Kalodner, *Circuit Judge*, dissenting.

By legislative enactment forty states of the Union and the District of Columbia[1] impose a one-year residence requirement as a condition of eligibility to qualify for public assistance grants to needy families with children.

The Congress of the United States, in enacting legislation providing for federal contributions to such state administered public assistance programs has in specific terms provided that states may establish a one-year residence eligibility requirement.[2]

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[1] District of Columbia Public Assistance Act of 1962, Title 3, Chapter 2, D.C. Code; §3-203, "Eligibility for public assistance", enacted by Congress on October 15, 1962.

[2] Section 602(b), 42 U.S.C.A.

The majority now holds that the one-year residence requirement imposed by the Pennsylvania statute[3] is unconstitutional under the Equal Protection Clause of the 14th Amendment because in its view it "has no logical basis and is wholly arbitrary in its application to needy residents of the Commonwealth."

In striking down the Pennsylvania statutory provision, the majority has, in sum, substituted its judgment for that of the Pennsylvania legislature, the legislatures of its thirty-nine sister states, and last enacted the federal contribution statute and the District of Columbia statutes.

The majority's action constitutes nothing less than judicial usurpation of the legislative function in presumptious disregard of the doctrine of separation of powers so firmly established since the founding of our Republic and of the teaching of numerous decisions of the Supreme Court of the United States.

In my opinion, the majority's "fact finding" that the statutory one-year residence requirement "has no logical basis and is wholly arbitrary," is entirely without evidentiary premise.

I am of the view that this Court should reject the plaintiffs' contention that the Pennsylvania statute is in contravention of the Fourteenth Amendment because the plaintiffs have failed to rebut the presumption of its constitutionality by proof that the statute "does not rest upon any reasonable basis, but is essentially arbitrary." Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61, 79 (1911).

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[3] Section 432(6) of the Pennsylvania Public Welfare Code, Act of June 13, 1967.

Discussion of the views stated must be prefaced by a statement of these settled principles to which a federal court must adhere in determining whether a statute contravenes the Fourteenth Amendment:

"... [T]he Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others," and "The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective."[4]

"State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality" and "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."[5]

"Every presumption is to be indulged in favor of faithful compliance by Congress with the mandates of the fundamental law," and "Courts are reluctant to adjudge any statute in contravention of them."[6]

"One who assails the classification" in a state statute "must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary."[7]

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[4] McGowan v. Maryland, 366 U.S. 420, 425 (1961).
[5] Id. 425, 426.
[6] United States v. Butler, 297 U.S. 1, 67 (1936).
[7] Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78, 79 (1911).

"A statute is not invalid under the Constitution because it might have gone farther than it did . . ." [8]

". . . 'reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.' " [9]

"Normally, the widest discretion is allowed the legislative judgment in determining whether to attack some, rather than all, of the manifestations of the evil aimed at; and normally that judgment is given the benefit of every conceivable circumstance which might suffice to characterize the classification as reasonable rather than arbitrary and invidious." [10]

Federal courts are now endowed with authority to determine whether the Congressional [legislative judgment] . . . is sound or equitable, or whether it [. . .] well or ill with the purposes of the Act," and the [. . .] or unwisdom" of a statute is an irrelevant factor in determining the issue of its constitutionality.[11]

The distilled essence of the stated principles is that legislatures are endowed with a wide range of discretion in enacting laws which affect some of its residents differently from others;[12] "every presumption" of constitutionality must be accorded by courts

[8] Rochen v. Ward, 279 U.S. 337, 339 (1929).
[9] Morey v. Doud, 354 U.S. 457, 465 (1957).
[10] McLaughlin v. Florida, 379 U.S. 184, 191 (1964).
[11] Flemming v. Nestor, 363 U.S. 603, 611 (1960).
[12] Except in instances where the differences are based on race, color or religion. Loving v. Virginia, 388 U.S. 1 (1967).

to a challenged law and the challenger bears the burden of proving that the law is irrational and "essentially arbitrary"; a statutory discrimination will not be declared unconstitutional "if any state of facts reasonably may be conceived to justify it"; the circumstance that a law "might have gone further than it did" in remedying a public social problem does not make it unconstitutional; and the "wisdom or unwisdom," soundness or unsoundness of the legislative judgment are irrelevant considerations in determining the issue of constitutionality.

The majority has not applied the stated principles in holding that the Pennsylvania one-year residence requirement contravenes the Fourteenth Amendment.

Its threshhold errors are (1) failure to take into account the wide range of discretion vested in the Pennsylvania legislature; (2) failure to accord to the challenged statute the presumption of constitutionality; and (3) failure to give effect to the doctrine that a state may enact laws which affect some of its residents differently from others when the difference is not based on racial or religious considerations.

The majority has structured its ruling on these stated conclusions:

> ". . . [We] are totally at a loss to discern what purpose, if any, the Pennsylvania Legislature has ascribed to the one-year residence requirement;"
>
> the ". . . division of Pennsylvania residents into two classes: those who have lived in the State for one year and those who have lived in

the State for less than one year . . . has no apparent purpose";

". . . many of the burdensome budgetary and administrative problems" of public welfare officials "would be substantially alleviated by the removal of this bottleneck in the processing of applicants";

". . . the added cost to the Commonwealth of helping the now excluded class would be relatively insignificant."

With respect to these "conclusions" this must be said:

The majority's failure to "discern" the legislative purpose in enacting the one-year residence requirement and its further failure to see any "apparent purpose" into "the division of Pennsylvania residents into two classes," do not afford an affirmative legal basis for its ultimate fact-finding that "Plaintiffs' evidence showed that the requirement of one year's residence as a condition to the receipt of public assistance has no logical basis and is wholly arbitrary in its application to needy residents of the Commonwealth."

Nor do the majority's conclusions that (1) Pennsylvania's "burdensome budgetary and administrative problems . . . would be substantially alleviated" if the legislature had not enacted the one-year residence requirement, and (2) ". . . the added cost to the Commonwealth of helping the now excluded class would be relatively insignificant," provide a premise for its holding of unconstitutionality. These conclu-

sions are merely "judgment" conclusions which in effect substitute the judgment of a court for the judgment of the legislature. As earlier stated, the "wisdom or unwisdom" of a statute is an irrelevant consideration in determining the issue of unconstitutionality.

Coming now to my view that the challenged Pennsylvania statute must be held constitutional because the plaintiffs have failed to rebut the presumption of its constitutionality by adducing evidence that the statute "does not rest upon any reasonable basis but is essentially arbitrary."

The "evidence" relied on by the majority is not by any stretch of the imagination "evidence" within the meaning of that term. The majority has treated as "evidence" its "loss to discern" any "purpose" in the enactment of the legislation, and its "judgment" conclusion that Pennsylvania's "burdensome budgetary and administrative problems . . . would be substantially alleviated" if the challenged residence requirement had not been enacted. The speculative evidence that the "added cost to the Commonwealth of helping the now excluded class would be relatively insignificant" is irrelevant to the determination of the constitutionality of the legislation.

The following "state of facts reasonably may be conceived to justify" the challenged statutory discrimination:[13]

The Pennsylvania Legislature annually enacts a budget for the following year which must limit the

[13] McGowan v. Maryland, 366 U.S. 420, 426.

total of its appropriations to its estimated annual tax revenue, inasmuch as Pennsylvania's Constitution limits the Commonwealth's borrowing capacity to $1,000,000.

The Pennsylvania Legislature appropriated [$199,800.00] of state revenues for public assistance grants for the fiscal year ending June 30, 1968—a significant percentage of the Commonwealth's annual budget.

The Legislature in its budget-making is required to make such an appropriation for public assistance as can be reasonably and intelligently estimated on the basis of these factors:

1. The estimated yield of state taxes.

2. The number of its residents currently receiving public assistance grants. They include needy families with dependent children, indigent aged and blind, permanently disabled persons between the ages of 18 and 64, and those who need assistance in the payment of bills for in-patient hospital and nursing home care, doctor, dentist, nursing and drug expenses.[14]

3. Increase in cost-of-living expenses of those on public assistance rolls which make necessary increased allotments.

4. Increase in the number of those receiving indigent aged assistance in view of the extended life expectancy experienced in recent years.

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[14] The skyrocketing increase in hospitalization and medical expense during the past two years alone is evidenced by the fact that the legislative allowance for these items alone leaped from $38,600,000 in the fiscal year ending June 30, 1967 to $61,200,000 for the fiscal year ending June 30, 1968.

It is a conceivable fact that in light of the foregoing factors the Pennsylvania Legislature enacted the one-year residence eligibility requirement to serve predictive purposes in making its appropriations for public assistance.

The foregoing establishes that the Pennsylvania one-year residence eligibility requirement "cannot be condemned as so lacking in rational justification as to offend due process." Flemming v. Nestor, 363 U.S. 603 (1960). In that case the Supreme Court explicitly stated, at page 612, that the factor of residence "can be of obvious relevance to the question of eligibility." It did so in ruling constitutional Section 202(n) of the Social Security Act, 42 U.S.C.A. §402(n), which provides for termination of old-age, survivor, and disability insurance benefits payable to, or in certain cases in respect of, an alien individual who is deported under §241(a) of the Immigration and Nationality Act, 8 U.S.C.A. §1251(a), on any one of certain grounds specified in §202(n).

It is pertinent to call attention to the fact that Congress in enacting the Social Security Act provided, in Section 202(t), 42 U.S.C.A. §402(t), for termination of benefits payable under the Act to any alien beneficiary who had resided outside the United States for more than six months.

For the reasons stated, I am of the opinion that the one-year residence eligibility requirement of Section 432(6) of the Pennsylvania Public Welfare Code, Act of June 13, 1967 does not contravene the Fourteenth Amendment.

This must be added. The majority's opinion does not advert to the plaintiffs' alternative claim that the one-year residence eligibility requirement is unconstitutional because it abridges their right of freedom to travel from one state to another.

In my opinion that alternative claim is so specious and unfounded that it does not merit extended discussion. It is only necessary to say that the Pennsylvania statute does not "prohibit" travel into the Commonwealth as evidenced by the facts that the plaintiffs in the instant case were freely permitted entry. The fact that the one-year eligibility requirement may operate to affect a decision to travel into Pennsylvania cannot by any stretch of the imagination be construed as a "statutory" bar to travel.

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In the

Supreme Court of the United States

OCTOBER TERM, 1968

No. [redacted]9

BERNARD SHAPIRO, Welfare Commissioner of Connecticut

Appellant

v.

VIVIAN THOMPSON

Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

JURISDICTIONAL STATEMENT

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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No.

BERNARD SHAPIRO, Welfare Commissioner of State of Connecticut

Appellant,

v.

VIVIAN THOMPSON

Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

JURISDICTIONAL STATEMENT

Judgment Appealed From

Appellant, Bernard Shapiro, Commissioner of Welfare, State of Connecticut, appeals from the final judgment of the specially-constituted United States District Court for the District of Connecticut. Appellant submits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW

The Opinion of the United States District Court for the District of Connecticut which is the subject of this appeal is not yet reported. A copy of the Opinion is attached hereto as Appendix A.

Jurisdiction

This action was brought by the appellee (plaintiff) in the U. S. District Court for the District of Connecticut under 42 U. S. C. Section 1983 and 1988 and 28 U. S. C. 1343 (3) to declare Chapter 299, Section 17-2d of the Connecticut General Statutes unlawful and unenforceable as it contravenes the United States Constitution, and it enjoins the appellant (defendant) from enforcing said statute against the appellee (plaintiff), and it gives the appellee (plaintiff) money damages because the enforcement of said statute has impaired her rights under Article IV, Section 2 (1) and Article XIV, Section 1 of the United States Constitution.

A special three judge court was convened to determine the cause pursuant to 28 U. S. C. Section 2281 et seq. In due course the matter was heard and an opinion was rendered on June 19, 1967 in favor of the appellee (plaintiff) and a judgment pursuant to the opinion was entered on June 30, 1967 in her favor. From this judgment the appellant (defendant) has appealed.

The jurisdiction of the Supreme Court to review by direct appeal is conferred by 28 U. S. C. 1253. The following decisions sustain the jurisdiction of this Court to review a judgment on direct appeal from a three judge district court:

United States v. *Georgia Public Service Commission*, 371 U.S. 285, 287;

American Federation of Labor v. *Watson*, 327 U.S. 582, 591.

Statutes Involved

Section 17-2d of the 1965 Supplement to the Connecticut General Statutes is the statute involved and this statute and the regulations promulgated pursuant to this statute are set

forth in Appendix B and C respectively which are attached hereto.

Questions Presented

The following questions are presented by this appeal.

A. Whether Section 17-2d of the 1965 Revision to the Connecticut General Statutes is unconstitutional because it allegedly violates the 14th Amendment Section I to the United States Constitution.

B. Whether Section 17-2d is unconstitutional because it allegedly violated Article IV Section 2 (1) of the United States Constitution.

C. Whether in any event the plaintiff had a legal right to public welfare from the State of Connecticut.

D. Whether the Court could collect money damages in a case in which the state did not consent to be sued.

E. Whether there was sufficient testimony, either oral or by stipulation, on which the Court could award money damages.

F. If the answer to E is "No" then whether the Three Judge Court was dealing with a moot question as plaintiff became eligible for welfare before the judgment was handed down.

Statement of Facts

The plaintiff, a 19 year old unwed mother of a minor child, moved from Massachusetts, where she had been receiving Aid to Dependent Children from the City of Boston, to Hartford, Connecticut on or about June 20, 1966. The plaintiff who was pregnant and later gave birth to another child lived with her mother for a while in Hartford.

Because of her mother's inability to support her, the plaintiff applied for Aid to Dependent Children from the City of Hartford. Here she was told that because of 17-2d of the Connecticut Statutes she was only eligible for temporary aid.

On October 3, 1966 the plaintiff applied for Aid to Dependent Children from the Connecticut Welfare Department of which the defendant is Commissioner. Her application was denied on November 1, 1966 solely because of residency requirements. The plaintiff took a Fair Hearing appeal from this refusal and the Fair Hearing Officer upheld the refusal on the basis of 17-2d.

Catholic Family Services has supported the plaintiff from January 25, 1967 to June 20, 1967 when she became eligible for Aid to Dependent Children.

Connecticut has no residency requirements for any public assistance program except Aid to Dependent Children, and under Aid to Dependent Children Connecticut pays 54% of the cost with the Federal Government paying 46%. The average cost per individual case on Aid to Dependent Children in Connecticut is $48.40 per month.

Under the Connecticut regulations to 17-2d a person with a bona fide job offer coming to the state is eligible for Aid to Dependent Children and if they are ready, willing and able to work but have no bona fide job offer, they are eligible for Aid to Dependent Children if they sign up for training under the Title V program.

Connecticut's yearly per person case load on Aid to Dependent Children has increased from 26,076 in 1960 to 48,485 in 1966.

In 1965 there were 40 states in the United States that had residency requirements for Aid to Dependent Children.

The Questions are Substantial

I. Does Plaintiff Have a Legal and Constitutional Right to Welfare?

Until the present case was decided, every Court that had previously passed on the questions of residency or of right to welfare had stated that public welfare to the poor was a gratuity and that there was no constitutional or legal right to poor relief, and if it was granted, the circumstances incident thereto were primarily legislative questions. *People ex rel Heydenreich* v. *Lyons*, 30 N. E. 2d 246.

As recently as October 7, 1966 in an action by mothers of children, receiving Aid to Dependent Children, for a declaratory judgment or injunctive relief, the Federal District Court for the District of Columbia held it had no jurisdiction. The Court stated that payment of relief funds are grants and gratuities. Their disbursement does not constitute payment of a legal obligation that the government owes. Being absolutely discretionary, there is no judicial review of the matter in which that discretion is exercised. *Smith* v. *Board of Commissioners of D.C.*, 259 F. Supp. 423, 434. To the same effect that the Court has no jurisdiction, on July 20, 1967 the United States District Court for the Northern District of California dismissed a case on the constitutionality of the California residency statute for Aid to Dependent Children on the ground "that there are no substantial constitutional questions involved." *Martha Marshall, et al* v. *California Department of Social Welfare, et al*, Civil Action File No. 47401. See also *Jennings* v. *Davidson County*, 344 S.W. 2d 359, 362.

II. Does 17-2d Violate the Fourteenth Amendment?

The appellant wants to make it perfectly clear that 17-2d is not the type of statute that the Supreme Court has been declaring unconstitutional with monotonous regularity in

recent years. This is not the racially-aimed statute, passed, with tongue in cheek, knowing that it will be struck down, in order to delay integration and harass civil rights adherents.

Section 17-2d was passed by a legislature faced with very rapidly rising welfare costs in a state that has long been a leader in the fields of public welfare and civil rights. Forty sister states have similar legislation, and the U. S. Congress in passing 42 U. S. C. A. Sec. 602 (b) has for a long period of time recognized the problems involved and the propriety of such legislation.

It is elementary that every presumption shall be given in favor of the constitutionality of a state statute. *Reynolds* v. *Sims*, 377 U.S. 533, 584; 12 L. Ed. 2d 506, 540. The Lower Court should have heeded the language of *Morey* v. *Dowd*, 354 U.S. 457, 463; 1 L. Ed. 2d 1485, 1490 to the effect that a state should be allowed great latitude in drawing its statutes, and they should be struck down only if clearly invidious and obnoxious. The burden should have been on the plaintiff to show at the claimed inequality alleged to result from 17-2d is actually and palably unreasonable and arbitrary. *Frost* v. *Corporation Commission of Oklahoma*, 278 U.S. 515, 522; 73 L. Ed. 483, 488.

The primary and the central purpose of the 14th Amendment was to deal with establishment of equality of basic civil and political rights based on race. *Shelley* v. *Kraemer*, 334 U.S. 1, 23; 92 L. Ed. 1161, 1188 and recently reiterated in *McLaughlin* v. *Florida*, 379 U.S. 184, 192; 13 L. Ed. 2d 222, 228.

Therefore, as here, when it is used to strike down a state statute admittedly not racially motivated, the Court should very carefully scrutinize the legal basis on which they base their decision. The appellant contends that the cases used by the majority to support their decision are clearly not in point.

III. Do the Cases Cited by the Lower Court Support Their Opinion?

All the statutes in the cases cited by the Lower Court to support their opinion differ in at least one to four respects from Section 17-2d. These statutes were either (1) racially aimed, (2) permanent in the effect on the person or persons aimed at, (3) had criminal penalties, and (4) did not, in effect, tell the state involved how it should spend its own tax raised funds.

17-2d is admittedly not racially aimed. Under this statute, and the regulations interpreting it, it clearly is not permanent in its effect. There is no criminal or civil penalties attached, and the Court's decision below does tell Connecticut how it will spend its own tax raised funds.

The case upon which the majority opinion rests, *Edwards* v. *California,* 314 U.S. 160 is a decision with which the appellant agrees. However, it does not support the conclusion reached by the Lower Court. The California statute was penal, it was permanent and as Justice Byrnes pointed out all of Mr. Duncan's support came from the Federal Government under the Farms Security Act and no money was contributed by California.

If Mr. Duncan came to Connecticut today with a family, he would be clearly eligible for welfare under 17-2d and its interpretive regulations because it was obvious that he came from a job in Texas under the W. P. A. to work in California under the provisions of the Farms Securities Act. And it is clear under these statutes that they were passed "in order to continue to provide work for needy persons on useful public projects." U. S. Statute at Large Volume 53 Part II page 927.

IV. Does 17-2d Violate Article IV, Section 2?

In view of the Lower Court's decision this would seem to be a moot issue.

V. In View of the 11th Amendment, May the Court Award Money Damages?

The appellant agrees that a three judge court when properly convened can pass on the constitutionality of a state statute by rendering a declaratory judgment and enjoin the state officers from proceeding under it, but nothing in the statutes such as 28 U. S. C. A. 2281 or the present case law allows the Court to override the 11th Amendment and grant money damages to a private citizen.

If the 11th Amendment is to mean anything it must stand for that.

"A state's freedom from litigation was established as a constitutional right through the 11th Amendment. The inherent nature of sovereignty prevents action against a state by its own citizens without its consent." *Great Northern Life Insurance Co.* v. *Reed,* 322 U.S. 48, 51; 88 L. Ed. 1125, 1129; see also *Monaco* v. *Mississippi,* 292 U.S. 313, 324 and *Ex Parte State of New York,* 256 U.S. 490, 497.

Ex Parte Young, 209 U.S. 123 quoted by the majority in the Lower Court does not refute this appellant's contention. No money damages were sought there. That case was a personal contempt case. In our present case money damages would come from the sovereign state not the defendant Shapiro.

The *Sherbert* v. *Verner* case cited below by the majority does not support any theory allowing a money judgment against the state. Nowhere does the Court say the appellant there will get her back wages. They only hold they cannot apply eligibility provisions so as to constrain a worker to

abandon his religious convictions respecting a day of rest, *Sherbert* v. *Verner*, 374 U.S. 398, 410. Further, that case may be distinguished by the fact Sherbert had earned her unemployment compensation by the sweat of her brow and had a fixed ascertained property right. There are no cases that a welfare recipient has a fixed ascertained property right to public assistance.

VI. Did the Court Decide a Moot Question?

If the appellee was not entitled to money damages either because she could not sue Connecticut without its consent or because the Supplemental Stipulation of Facts did not factually support a money judgment then the question was moot when the Lower Court rendered its decision.

The one year period for the residency requirement had passed as to the appellee, and she was eligible for welfare. There was nothing left for the Court to decide.

VII. The Lower Court's Decision Has the Effect of Telling Connecticut How to Spend its Tax Raised Funds.

"The Federal Court should be extremely cautious in striking down state statutes which involve the spending of state tax raised funds or the state's power to legislate for public welfare will be seriously curtailed". *Everson* v. *Board of Education, Township of Ewing*, 330 U.S. 1, 6; 91 L. Ed. 711, 718.

The appellant can find no cases in which this drastic result has been reached. The Lower Court has told Connecticut just how they will spend state funds and the amount they will spend. The easily forseeable result of this unfortunate order is that each state in the same position will seek to reach the lowest common denominator in giving welfare and emasculate the welfare programs of the more progressive states.

Conclusion

The questions involved here are substantial and ought to be resolved by this Court. The raising and spending of state tax raised funds in forty states, is at issue. This is a question not only of national importance but one never passed upon by this Court and it ought now to be determined by this Court.

Respectfully submitted,

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APPENDIX A

United States District Court

District of Connecticut

VIVIAN MARIE THOMPSON

v.

BERNARD SHAPIRO, Commissioner of Welfare of the State of Connecticut

Civil No. 11,821

Before: SMITH, Circuit Judge, Blumenfeld and Clarie, District Judges.

MEMORANDUM OF DECISION

SMITH, Circuit Judge:

This action was brought in the United States District Court for the District of Connecticut under Title 28 U. S. Code, §§2281 and 2284, seeking a declaration that Chapter 299, §17-2d of the Connecticut General Statutes is unlawful as in violation of the Constitution of the United States and seeking an injunction against its enforcement and payment of monies unconstitutionally withheld. A three-judge district court was convened pursuant to the statute, hearings were held, briefs were filed and arguments were made. Notification of pendency of the action was given to the United States because of possible effect on federal statutes, and the Solicitor General notified the court of his decision that the United States would not intervene in the case.[1] The court has considered the stipulations of facts, the testimony

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[1]The state moved to have the court apply the doctrine of equitable abstention. The court, however, declined to exercise its discretionary equity powers because, "the state statute in question . . . is not fairly subject to an interpretation which will render unnecessary or substantially modify the federal constitutional question . . ." *Harman v. Forsenius*, 380 U.S. 528, 534-35 (1965).

taken, the briefs and arguments of the parties, and finds the issues in favor of the plaintiff.

In June of 1966, Vivian Marie Thompson, the plaintiff in this action, and a citizen of the United States, moved from Boston, Massachusetts, to Hartford, Connecticut. Plaintiff's purpose in moving was to live near her mother. Then the mother of one and now the mother of two, plaintiff had been receiving Aid to Dependent Children (ADC) from the City of Boston. Boston discontinued this aid in September because of plaintiff's change of residence. When she applied for similar assistance to Bernard Shapiro, Commissioner of Welfare of the State of Connecticut and the defendant in this proceeding, he denied ADC to her on November 1 because plaintiff, although she was otherwise eligible, had not met the one year residence requirement of Conn. Gen. Stat. §17-2d which provides as follows:

> "When any person comes into this state without visible means of support for the immediate future and applies for Aid to Dependent Children under Chapter 301 or general assistance under Part I of Chapter 308 within one year from his arrival, such person shall be eligible only for temporary aid or care until arrangements are made for his return, provided ineligibility for Aid to Dependent Children shall not continue beyond the maximum federal residence requirement."

As can be seen, it was to insure continuation of the state's right to receive the substantial payments which the Federal Government pays to the state for federally approved plans of state aid to needy families with children that §17-2d is keyed to the federal limitation on residence requirements. At the present time, the Social Security Act, 49 Stat. 627 (1935), as amended, 42 U. S. C. §602(b) (1959), limits the length of the period of prior residence which a state can require as a condition of eligibility to one year in order to

obtain such approval. Thus ADC programs are financed jointly by the State and Federal Governments and generally the responsibility is shared approximately equally. Some states, like Connecticut, impose the maximum residence requirement allowed by §602(b); other require a shorter period of residence, or none at all. The Catholic Family Services of Hartford have been supporting plaintiff pending the outcome of this action; these private payments, however, are below Connecticut's ADC level. See, *Harvith, The Constitutionality of Residence Tests for General and Categorical Assistance Programs,* 54 Calif. L. Rev. 567, 569 n. 28 (1966) which cites as its authority, NATIONAL TRAVELERS AID ASS'N., ONE MANNER OF LAW — A HANDBOOK ON RESIDENCE REQUIREMENTS IN PUBLIC ASSISTANCE 8-13 (1961).

The Welfare Department of the State of Connecticut has promulgated regulations which construe in the following manner the words "without visible means of support for the immediate future" contained in §17-2d:

1. Persons or families who arrive in Connecticut without specific employment.

2. Those arriving without regular income or resources sufficient to enable the family to be self-supporting in accordance with Standards of Public Assistance.

3. "Immediate future" means within three months after arriving in Connecticut.

NOTE: Support from relatives or friends, or from a public, private, or voluntary agency for three months after arrival will not satisfy the requirements of the law, which relates to self-support rather than to dependency.

Connecticut Welfare Manual, Vol. 1, Ch. II, §219.1.

In accord with the above, the regulations further provide:

> 1. If the application for assistance is filed within one year after arrival in Connecticut, the applicant must establish that he was self-supporting upon arrival and for the succeeding three months thereafter; or
>
> 2. If the application for assistance is filed within one year after arrival in Connecticut, the applicant must clearly establish that he came to Connecticut with a bona fide job offer; or
>
> 3. If the application for assistance is filed within one year after arrival in Connecticut, the applicant must establish that he sought employment and had sufficient resources to sustain his family for the period during which a person with his skill would normally be without employment while actively seeking work. Personal resources to sustain his family for a period of three months is considered sufficient. Those who come to Connecticut for seasonal employment such as work in tobacco or short term farming are not deemed to have moved with the intent of establishing residence in Connecticut.
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> Connecticut Welfare Manual, Vol. 1, Ch. II, §219.2.

Thus, Connecticut withholds ADC for one year to newly-arrived residents unless they come to Connecticut with substantial employment prospects or a certain cash stake.

Plaintiff came to Connecticut with neither the prospect of employment nor the necessary cash stake. It is her contention in this action that Connecticut's denial of ADC results in an unlawful discrimination violative of her constitutional rights under the equal protection and privileges and immunities clauses of the Fourteenth Amendment and the privileges and immunities clause of Art. IV. §2. Plaintiff contends that Connecticut discriminates against her in favor

of three classes of persons: newly-arrived residents with employment, newly-arrived residents with a stake and residents of one year's duration.

At the outset, it will be helpful to highlight what is at issue here by excluding what is not. Plaintiff does not argue that Connecticut cannot deny ADC to non-residents. Since plaintiff is a citizen of Connecticut, her reliance on the privileges and immunities clause of Art. IV. §2 is misplaced; that clause only outlaws discrimination by one state against citizens of another state. *New York* v. *O'Neill*, 359 U.S. 1, 6 (1959). We have no question of the state's power under the Tenth Amendment to provide for relief to the indigent, whether by state agencies, town agencies or otherwise. Nor is any claim made here of a local, state or federal constitutional duty to provide aid at all, or any kind or amount of aid. What we do have is a claim that a state may not discriminate by arbitrarily classifying those who shall and those who shall not be provided with aid, because such discrimination violates rights guaranteed by the first section of the Fourteenth Amendment to the Constitution of the United States.

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Plaintiff's argument based on privileges and immunities is premised primarily on the right of interstate travel. That right, so the argument goes, is abridged by Connecticut's practice of denying ADC to those in plaintiff's situation

because it chills their mobility. The existence, source and dimensions of the right to travel have been the subject of much constitutional debate. In *Edwards* v. *California,* 314 U.S. 160 (1941), the Court struck down a California statute which made it a misdemeanor to bring an indigent nonresident into the state. The rationale of the majority was that the statute violated the Commerce Clause. Mr. Justice Jackson, concurring, would have held that the statute abridged the state citizenship and privilege and immunities clauses of the Fourteenth Amendment. 314 U.S. at 181-86. Mr. Justice Douglas, joined by Justices Black and Murphy, would also have rested on the privileges and immunities clause. 314 U.S. at 177-81. In the passport cases, which deal with the right of foreign travel, the Court relied on Fifth Amendment notions of liberty. *Zemel* v. *Rusk,* 381 U.S. 1, 14 (1965); *Aptheker* v. *Secretary of State,* 378 U.S. 500, 505-06 (1964); *Kent* v. *Dulles,* 357 U.S. 116, 126-27 (1958). Finally, in *United States* v. *Guest,* 383 U.S. 745, 759 (1966), the Court ruled that, "Although there have been recurring differences in emphasis within the Court as to the source of the constitutional right of interstate travel, there is no need here to canvass those differences further. All have agreed that the right exists." The Court thereby quieted any doubts that might have remained about the existence of the constitutional right of interstate travel but left unanswered questions regarding its source and dimensions. The defendant contends that the plaintiff is not deprived of the right to travel and to settle in Connecticut since she may do so freely so long as she does not seek welfare benefits until after she has resided here for a year.

Whether or not the state citizenship clause and the privileges and immunities clause[2] are the as yet unnamed

[2]To abridge the privileges and immunities clause of the Fourteenth Amendment, the challenged state action must contravene a right inherent in national, as opposed to state, citizenship. *Adamson v. California,* 332 U.S. 46, 52-53 (1947). The Supreme Court has seldom

source of the right of interstate travel, Mr. Justice Jackson's concurrence in *Edwards*, which as mentioned above was based on those clauses, delineates in timeless language the dimensions of the right.

> . . . it is a privilege of citizenship of the United States, protected from state abridgement, to enter any state of the Union, either for temporary sojourn or for the establishment of permanent residence therein and for gaining resultant citizenship thereof. If national citizenship means less than this, it means nothing.
>
> State citizenship is ephemeral. It results only from residence and is gained or lost therewith. That choice of residence was subject to local approval is contrary to the inescapable implications of the westward movement of our civilization. 314 U.S. at 183.

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defined a right of national citizenship. See, *Colgate v. Harvey*, 296 U.S. 404, 436 (1935) (Stone, J., dissenting) overruled *Madden v. Kentucky*, 309 U.S. 83 (1940); *Hague v. CIO*, 307 U.S. 496, 520-21 n. 1 (1939) (Stone, J., concurring). According to Mr. Justice Douglas, "judicial reluctance to expand the content of national citizenship . . . has been due to a fear of creating constitutional refuges for a host of rights historically subject to regulation." *Bell v. Maryland*, 378 U.S. 226, 242, 250 (1964) (Douglas, J., concurring). Nevertheless, there is continuous and abundant judicial recognition that the privileges and immunities clause means something. See the cases cited *supra* in this footnote and, e.g., *United States v. Guest*, 383 U.S. 745, 762, 764-67 (1966) (Harlan, J., concurring and dissenting); *New York v. O'Neill*, 359 U.S. 1, 12, 13 (1959) (Douglas, J., dissenting). See also, *Oyama v. California*, 332 U.S. 633, 640 (1948) which speaks of "privileges as an American citizen". An *en banc* decision of the Court of Appeals for the Second Circuit, *Spanos v. Skouras Theatres Corp.*, 364 F. 2d 161, 170 (2d Cir.), cert. denied, 385 U.S. 987 (1966), stated among other reasons for its decision, that:

> under the privileges and immunities clause of the Constitution no state can prohibit a citizen with a federal claim or defense from engaging an out-of-state lawyer to collaborate with an in-state lawyer and give legal advice concerning it within the state.

As quoted in the text, *infra*, "If national citizenship means less than" the right "to enter any State of the Union, either for temporary sojourn or for the establishment of permanent residence therein and for gaining resultant citizenship thereof . . . it means nothing." *Edwards v. California*, 314 U.S. 160, 181, 183 (1941) (Jackson, J., concurring).

> Any measure which would divide our citizenry on the basis of property into one class free to move from state to state and another class that is poverty-bound to the place where it has suffered misfortune is not only at war with the habit and custom by which our country has expanded, but is also a short-sighted blow at the security of property itself. Property can have no more dangerous, even if unwitting, enemy than one who would make its possession a pretext for unequal or exclusive civil rights. Where those rights are derived from national citizenship no state may impose such a test, and whether the Congress could do so we are not called upon to inquire. 314 U.S. at 185.

In short, the right of interstate travel embodies not only the right to pass through a state but also the right to establish residence therein.

While prior "right to travel cases" have been concerned with absolute proscriptions on movement, *Guest* may be read as proscribing the discouragement of interstate travel. The Court there upheld a paragraph of an indictment based on 18 U. S. C. §241 which outlaws conspiracy to interfere with rights or privileges secured by the Constitution. The paragraph charged interference with, "The right to travel freely to and from the State of Georgia and to use highway facilities and other instrumentalities of interstate commerce within the State of Georgia." 383 U.S. at 757. The Court went on to say that, "if the predominant purpose of the conspiracy is to impede or prevent the exercise of the right of interstate travel, or to oppress a person because of his exercise of that right, then, whether or not motivated by racial discrimination, the conspiracy becomes a proper object of the federal law under which the indictment in this case was brought." 383 U.S. at 760. By employing the words "impede" and "oppress", the Court must have contemplated that the discouragement of interstate travel is also forbidden.

Further support for the proposition that the right of interstate travel also encompasses the right to be free of discouragement of interstate movement may be found by analogy to cases proscribing actions which have a chilling effect on First Amendment rights. See *Dombroski* v. *Pfister*, 380 U.S. 479, 487 (1965); *Wolff* v. *Selective Service Local Board No.* 16, 372 F. 2d 817 (2d Cir. 1967). Finally, it should be italicized that the statute invalidated in *Edwards* penalized the sponsor of the indigent, not the indigent himself. In short, whatever its source, the right to travel exists and included within its dimensions is the right to establish residence in Connecticut. Denying to the plaintiff even a gratuitous benefit because of her exercise of her constitutional right effectively impedes the exercise of this right. See *Sherbert* v. *Verner*, 374 U.S. 398, 405-06 (1963). Because Conn. Gen. Stat. §17-2d has a chilling effect on the right to travel, it is unconstitutional.

Not only does §17-2d abridge the right to travel and its concomitant right to establish residence, but it also denies plaintiff the equal protection of the laws. "Judicial inquiry under the Equal Protection Clause . . . does not end with a showing of equal application among the members of the class defined by the legislation. The courts must reach and determine the question whether the classifications drawn in a statute are reasonable in light of its purpose . . ." *McLaughlin* v. *Florida*, 379 U.S. 184, 191 (1964). Connecticut states quite frankly that the purpose of §17-2d is to protect its fisc by discouraging entry of those who come needing relief.[3] The state has not shown that any significant number

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[3]The legislative history further demonstrates that this is the purpose of §17-2d. For example, Mr. Cohen, while recognizing that only a small proportion of new arrivals come to Connecticut to seek welfare, made the following argument in favor of §17-2d:

> If we pass this Bill, the word could get around that we are not an easy state, and the rate of influx might relate more closely to the level of job opportunity. As responsible legislators we must, at some point, be interested in costs. I doubt that Connect-

come for that purpose, and the evidence indicates that most of the class discriminated against coming for other purposes, such as, hope of employment, to be with relatives in time of need, as in the case of plaintiff, or to resume residence in Connecticut after a period of absence. Even a classification denying aid to those whose sole or principal purpose in entry is to seek aid, however, would not be sustainable. Anyway, the classification made here, based not on purpose in coming but solely on indigency, hits most heavily those with not even an arguably bad purpose in coming and may not be upheld. As detailed above, the purpose of §17-2d, to discourage entry by those who come needing relief, abridges the right to travel and to establish residence. A similar purpose was behind the statute invalidated in *Edwards*. California in *Edwards*, like Connecticut here, tried to justify its statute under the police power.

> Their coming here has alarmingly increased our taxes and the cost of welfare outlays, old age pensions, and the care of the criminal, the indigent sick, the blind and the insane.
>
> Should the states that have so long tolerated, and even fostered, the social conditions that have reduced these people to their state of poverty and wretchedness, be able to get rid of them by low relief and insignificant welfare allowances and drive them into California to become our public charges, upon our immeasurably higher standard of social services? Naturally, when these people can live on relief in California better than they can by

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icut can, or should continue, to allow unlimited migration into the State, on the basis of offering instant money and permanent income to all who can make their way to the State, regardless of their ability to contribute to the economy.

Connecticut General Assembly 1965. House of Representatives Proceedings, Vol. II Part 7, pp. 194-95 (Connecticut State Library).

> working in Mississippi, Arkansas, Texas or Oklahoma, they will continue to come to this State. 314 U.S. at 168.

Here, as there, the burden on the state treasury[4] does not justify an enactment with an invalid purpose.

The policy behind the equal protection clause has long been interpreted as that of preventing states from discriminating against particular classes of persons. *E.g., Yick Wo* v. *Hopkins,* 118 U.S. 356 (1886). Even if the purpose of §17-2d were valid, which it is not, the classifications established by the statute and the regulations promulgated thereunder are not "reasonable in light of its purpose." Admittedly, the classifications are not drawn on the presumptively suspect lines of race, creed or color. Nor, at the time application for aid is made, can it be said that they are based on poverty; for, at that time, all bona fide applicants are indigent. Furthermore, no inquiry is made into the assets at any past point in time of those applicants who enter with a job or those who have one year's residence. But there is a classification based on wealth between those who enter with a cash stake and those like plaintiff who do not. This classification is invalid because there is no showing that in the long run the applicant with the cash would be a lesser drain on the state treasury. Similarly, even though they are not based on wealth, the classifications of one year's residence or a job are not reasonable in light of the purpose of §17-2d because again there is no showing that those applicants will be lesser burdens than applicants without jobs or one year's residence. Section 17-2d, in brief, violates the equal protection clause because even if its purpose were valid,

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[4]Incidentally, a small part of Connecticut's ADC budget is involved and the burden on the state treasury is not overwhelming. Connecticut estimates that the indigent who would come in should plaintiff prevail would cost another 2% in ADC, that is, some $2,000,000 annually. Approximately half of this sum, of course, would be paid by federal appropriation through Congressional recognition of the national nature of the problem.

which it is clearly not, the classifications are unreasonable.

Granted, the state may provide assistance in a limited form with restrictions, so long as the restrictions are not arbitrary; but, in any case where the government confers advantages on some, it must justify its denial to others by reference to a constitutionally recognized reason. See *Sherbert* v. *Verner*, supra; *Speiser* v. *Randall*, 357 U.S. 513 (1958). In *Carrington* v. *Rash*, 380 U.S. 89, 96 (1965), while striking down a Texas law which prevented servicemen from voting, the Court was careful to emphasize that, "Texas is free to take reasonable and adequate steps . . . to see that all applicants for the vote actually fulfill the requirements of bona fide residence." For example, if there were here a time limit applied equally to all, for the purpose of prevention of fraud, investigation of indigency or other reasonable administrative need, it would undoubtedly be valid. Connecticut's Commissioner of Welfare frankly testified that no residence requirement is needed for any of these purposes.

Judgment may enter in favor of the plaintiff declaring the residence requirement of §17-2d of the Connecticut General Statutes invalid as applied to plaintiff, awarding plaintiff monies unconstitutionally withheld,[5] and enjoining defendant from denying plaintiff Aid to Dependent Children solely because of her failure to meet the one-year residence requirement. Form of decree, including computation of amount of damages due, may be submitted by counsel for plaintiff on notice to counsel for defendant.

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[5]That a state cannot be sued without its consent, *Monaco v. Mississippi*, 292 U.S. 313 (1934), is no barrier to awarding money damages here; for, in *Ex Parte Young*, 209 U.S. 123 (1908), the Court held that the Eleventh Amendment did not prevent a suit against a state official who was acting unconstitutionally. Consequently, this court can order Commissioner Shapiro to tender monies which he unconstitutionally withheld. See, *Department of Employment v. United States*, 385 U.S. 355, 358 (1966) where the Court ordered refund of taxes unconstitutionally paid. See also, *Sherbert v. Verner*, 374 U.S. 398 (1963) (unemployment benefits).

The above shall serve as the Findings of Fact and Conclusions of Law required by Fed. R. Civ. P. 52(a).

Dated at Hartford, Connecticut, this 19th day of June, 1957.

J. JOSEPH SMITH
United States Circuit Judge

M. JOSEPH BLUMENFELD
United States District Judge

I dissent, with opinion.

T. EMMET CLARIE
United States District Judge

CLARIE, District Judge, dissenting:

I respectfully dissent and disagree with the majority opinion that §17-2d of the Connecticut General Statutes is unconstitutional. The residence time qualification for welfare eligibility of non-residents coming into the State, as contained in the law, is a reasonable one directly related to the problem sought to be governed. It is a valid legislative classification, which the State has the discretion and authority to enact. It is not within the province of the judiciary to determine whether the remedy chosen is a wise one, but only whether it is constitutional. *Railway Express* v. *New York*, 336 U.S. 106, 109 (1949); *Daniel* v. *Family Ins. Co.*, 336 U.S. 220, 224-25 (1949); *Olsen* v. *Nebraska*, 313 U.S. 236, 246-47 (1941).

Forty other states of the United States, including Connecticut, have established a one-year residence requirement, as a condition of eligibility to qualify for aid to families with dependent children.[1] Congress itself has sanctioned the laws of these forty states, by enacting 42 U. S. C. A. §602(b), which provides for a federal contribution to state administered programs, where the condition of eligibility does not exceed a one-year prior residence. As a practical matter, most states require a residence eligibility requirement or waiting period for all forms of welfare benefits.[2]

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[1](a) Stipulation of the Parties, Para. 61.

(b) States which do not have any waiting period are Alaska, Georgia, Hawaii, Kentucky, Maine, North Dakota, South Dakota, New York, Rhode Island, and Vermont. *Pocket Data Book USA*, 1967, U.S. Dept. of Commerce, Statistical Reports Division, Lib. Cong. Card No. A66-7638.

[2]Some thirty-five (35) states require that an applicant must have resided within the state five of the preceding nine years, including the immediate past year to be eligible to receive old age, deaf and blind benefits. Five (5) other states require simply a one-year residence to receive these benefits. See, *Characteristics of State Public Assistance Plans Under the Social Security Act*, U.S. Gov. Print. Off. (1965). Also see, 42 U.S.C.A. §§ 1202, 1352.

The majority opinion concedes that the purpose of §17-2d is to protect the state's fiscal responsibilities by discouraging entry of those who come into the state seeking relief.[3] It goes even further and asserts that a classification denying aid to those whose sole or principal purpose in entering the state to seek aid would be unconstitutional. The principal basis for the majority position is that the law abridges the right of freedom to travel and to establish residence; and that because such a statute as §17-2d has a chilling effect on the right to travel, it is therefore unconstitutional. The landmark case cited to support this position is *Edwards* v. *California*, 314 U.S. 160 (1941).

The latter case can be distinguished from the issue being litigated here. It involved a state statute, which made it a crime to transport across the state line into California, one who was an indigent. This statute was ruled unconstitutional by the United States Supreme Court, because it not only restricted commerce between the several states, but it also actually limited the right of citizens to travel freely between the several states. On the contrary, the statute which is now in issue, does not prohibit travel between the states as such. What it does do and is intended to do, is to deter those who would enter the state for the primary or sole purpose of receiving welfare relief allotments.

Connecticut is comparatively generous in welfare grants. The legislature provides an open-end budget in its biennial appropriations to the State Welfare Department,[4] so that no qualified applicant may be denied aid or caused personal hardship by delay or the arbitrary limitation of budgetary appropriations. Connecticut ranks fourth among all the states, with monthly payments of $197.00 (46% contributed by the Federal Government) for a family of four, compared with

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[3]*Supra*, note 1(b) at 182.

[4]CONN. GEN. STAT. (Rev. 1958) § 4-95.

the national average of $148.00. An extreme comparison is had by comparing the average monthly payments for a similar family unit in Mississippi of $33.00; in Alabama, $48.00; in Florida, $60.00, and in South Carolina, $64.00. In these latter states, the Federal Government contributes 83%, the state 17%.[5] Thus by way of illustration and comparison, the State of Connecticut's monthly contribution is $109.00 compared with that of Mississippi's of $5.50. It should be noted that §17-2d applies both to the general assistance allotments under §17-273, Part I, Chapter 308, for which no federal contribution is provided, as well as to Chapter 301, Aid to Dependent Children. Uncontrolled demands upon Connecticut's welfare program could effect an overall reduction of aid paid to eligible beneficiaries. It is a proper function of the legislature to enact such reasonable statutory controls, under the police powers reserved to the state in the Federal Constitution,[6] that its obligations to aid the needy of the state may continue to be generously fulfilled. *Missouri, Kansas & Texas Railway* v. *Haber,* 169 U.S. 613, 629 (1898).

The United States Supreme Court recognized the problem when it upheld the constitutionality of the Federal Social Security Act:

> "A system of old age pensions has special dangers of its own, if put in force in one state and rejected in another. The existence of such a system is a bait to the needy and dependent elsewhere, encouraging them to migrate and seek a haven of repose. . . ." *Helvering* v. *Davis,* 301 U.S. 619, 644 (1937).

Connecticut has always freely exercised its sovereign right as a state, to legislate and administer welfare governing a myriad of comparable state services. A needy

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[5]Stipulation of Parties, Para. 58, 59.

[6]Art. X, Amendment to the Constitution of the United States.

student, to be eligible for a scholarship loan, must have resided within the state for the twelve (12) months previous to his application;[7] to receive aid to send a blind child for instructions, both the child and one of his parents or guardians must have resided within the state for one (1) year preceding the application.[8] To be an elector, one must have resided within the state for six months.[9] To be eligible to hold a liquor permit one must first be an elector.[10] With certain specified exceptions, a one year's residence is a prerequisite to applying for employment in the state merit system.[11] A plaintiff in a divorce action must have resided in the state continuously for three (3) years prior to bringing an action, unless the cause arose subsequent to residence within the state.[12] The captains and members of the crew of oyster boats, in order to be licensed must have a one-year residence,[13] as well as those who would take scallops from state waters;[14] and so on ad infinitum.

Are these residence requirements established through several generations of orderly state growth, now to be struck down as constituting a constitutionally unlawful discrimination between the citizens who have just moved into the state and those who meet these reasonable statutory requisites? Such a decree by judicial fiat would go far toward completing the annihilation of the police powers, which were reserved to the several states and to the people under the Tenth Amendment to the Federal Constitution.

It is not within the province of this Court to pass upon the state legislature's wisdom in causing the enactment of

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[7]CONN. GEN. STAT. (Rev. 1958) § 10-116(c).
[8]CONN. GEN. STAT. (Rev. 1958) § 10-295(b).
[9]CONN. GEN. STAT. (Rev. 1958) § 9-12.
[10]CONN. GEN. STAT. (Rev. 1958) § 30-45(3).
[11]CONN. GEN. STAT. (Rev. 1958) § 5-39.
[12]CONN. GEN. STAT. (Rev. 1958) § 46-15
[13]CONN. GEN. STAT. (Rev. 1958) § 26-212.
[14]CONN. GEN. STAT. (Rev. 1958) § 26-288.

this law, but whether or not the law violates the constitutionally guaranteed rights of its citizens. As Mr. Justice Frankfurter said in *Board of Education* v. *Barnette*, 319 U.S. 624, 647 (1942):

> "It can never be emphasized too much that one's own opinion about the wisdom or evil of a law should be excluded altogether when one is doing one's duty on the bench. The only opinion of our own even looking in that direction that is material is our opinion whether legislators could in reason have enacted such a law."

A historical review of the legislative act which preceded §17-2d illuminates and discloses the true purpose of this law. §1, Public Act No. 501, 1963 Connecticut General Assembly provided:

> "When any person comes into this state without visible means of support for the immediate future and applies for Aid to Dependent Children under Chapter 301 or general assistance under Part I of Chapter 308 of the General Statutes within one month from his arrival, the welfare commissioner shall determine whether such person's remaining will serve the best interests of (a) the state, (b) the town to which the person has come and (c) such person. In making his determination, the commissioner shall consider (a) the circumstances involved in such person's coming to this state, (b) his situation now that he is here, (c) the circumstances involved if he remains, (d) whether he comes to this state able and willing to support himself or whether he came for the purpose of seeking welfare assistance and (e) whether he will need such assistance indefinitely."

The 1965 Session then amended the law, §17-2d, so as to change the phrase "one month from arrival" to "one year from arrival"; it eliminated the statutory restrictive standards for the guidance of the commissioner's administration of the

act, and adopted the maximum federal residence requirement, 42 U. S. C. A. §602(b). The intent of the law was to keep those from benefits, who came into the state for the primary purpose of seeking welfare assistance and it should be so construed and interpreted. It has always been a principle of constitutional interpretation that the Courts, if at all possible, should construe a statute so as to bring it within the Constitution. *Michaelson* v. *United States*, 266 U.S. 42 (1924); *United States* v. *Delaware & Hudson Co.*, 213 U.S. 366 (1909).

The Public Welfare Committee of the 1967 Legislature, just adjourned, considered this residence issue in Substitute for Senate Bill No. 166; the bill was defeated by recommitment to committee.

The legislature so exercised its sovereign police powers to classify equally all non-residents who came into Connecticut, who applied for welfare aid within a stated time period. The law affected all persons similarly situated in the class described:

> "Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment." *Barbier* v. *Connolly*, 113 U.S. 27, 32 (1885).

Without such a statutory deterrent, this state would be powerless to prevent its becoming a refuge for welfare recipients of other states; even those who might be encouraged or even assisted to migrate from their settlement of origin.

> "Freedom of residence is restricted as to citizens only while on relief. . . . No interference is had with the right of any citizen to choose and establish a home. What is

controlled is the unrestricted imposition of indigent persons and families without settlement upon a community and state where they cannot establish a home because of their indigent status. . . . Such conditions restrict individual rights and freedom in the interest of the right, security and freedom of the rest of the community of the state." *Matter of Chirillo*, 283 N.Y. 417, 28 N.E. 2d 895 (dissenting opinion).

I further dissent from the award of money damages to the plaintiff by the majority for the past aid alleged to have been unconstitutionally withheld. Connecticut has not consented to be sued for money damages in this class of action. *Monaco* v. *Mississippi*, 292 U.S. 313, 324 (1933); *Ex Parte State of New York No.* 1, 256 U.S. 490, 497 (1920).

Welfare aid, by its nature, does not create a vested right to back payments which have been denied. Public welfare is a current subsistence grant from public charity funds administered by statutory standards. This is confirmed by the philosophy behind the state welfare laws requiring reimbursement from paupers for support payments. §§17-277, 17-298. This plaintiff has been living on monthly allotments from a private source, the Catholic Family Services of Hartford. A money judgment award, under the circumstances, would amount to a gratuitous windfall.

Without such a right to reimbursement for past allotments, the case is now moot. The plaintiff moved to Hartford, Connecticut in mid-June, 1966. Her present residence eligibility under §17-2d, having been satisfied, she now qualifies to apply for Aid to Dependent Children under Chapter 301. The case should accordingly be dismissed. *Doremus* v. *Board of Education*, 342 U.S. 429 (1952).

T. EMMET CLARIE
District Judge

APPENDIX B

Section 17-2d of the 1965 Supplement to the Connecticut General Statutes

Section 17-2d Eligibility for temporary aid pending return of non-residents

When any person comes into this state without visible means of support for the immediate future and applies for Aid to Dependent Children under Chapter 301 or general assistance under Part I of Chapter 308 within one year from his arrival, such person shall be eligible only for temporary aid or care until arrangements are made for his return, provided ineligibility for Aid to Dependent Children shall not continue beyond the maximum federal resident resuirement. (1963 P.A. 501, S. 1.2; February, 1965 P.A. 564 (a).)

APPENDIX C

Section 17-2d-1

Eligibility of Nonresidents Applying For Aid

Sec. 17-2d-1. Definitions.

As used in Section 17-2d of the 1965 Supplement to the General Statutes:

(a) "Arrival" is the establishment of a place of abode in Connecticut with intent to remain;

(b) "Visible means of support" consists of resources owned by the applicant, or income from regular employment other than seasonal or short-term, which resources or income are sufficient to enable the members of the family unit for whom assistance is sought to be self-maintaining in accordance with standards of public assistance;

(c) "Immediate future" is a period of not less than three months from the date of arrival in Connecticut;

(d) "Temporary aid or care" is welfare assistance granted to an applicant . . . up to the point at which arrangements as defined in this section have been made . . ., *provided such arrangements shall be made within sixty days from the date of application for aid;*

(e) "Arrangements" consists of a transportation plan for . . . return *of an applicant*, made by the agency to which application for assistance has been made; . . .

(f) "Return" means return to the place from which the family unit came to Connecticut;

(g) "Applicant" shall include members of the family unit for whom assistance is sought.

(Adopted May 3, 1966; amendment effective July 12, 1966.)

Section 17-2d-2. Exceptions. The provisions of Section 17-2d of the 1965 Supplement to the General Statutes shall not apply to persons coming into Connecticut from a state with which Connecticut has a formal agreement waiving residence under the provisions of Section 17-10 of the General Statutes or to persons coming into Connecticut from a state which has enacted an interstate compact similar to that contained in Sections 17-21a to 17-21d, inclusive, of the 1965 Supplement to the General Statutes. (Effective May 3, 1966.)

APPENDIX D

United States District Court

District of Connecticut

VIVIAN MARIE THOMPSON

v.

BERNARD SHAPIRO, Commissioner of Welfare of the State of Connecticut

Civil Action,
File Number 11,821

JUDGMENT

This action came on for hearing before a specially convened three judge panel of the Court consisting of the Honorable J. Joseph Smith, Circuit Judge presiding, and the Honorable M. Joseph Blumenfeld and the Honorable T. Emmet Clarie, District Judges, and, the issues having been duly heard and a decision having been duly rendered,

It is Ordered and Adjudged:

That Chapter 299, Section 17-2d of the Connecticut General Statutes is invalid as applied to the Plaintiff:

That an injunction hereby issues permanently restraining and enjoining the Defendant and his successors, and all other persons responsible for the enforcement of the welfare law of Connecticut from the present and further enforcement of Chapter 299, Section 17-2d of the Connecticut General Statutes against the Plaintiff;

That the Defendant pay to the Plaintiff the sum of $311.91, the sum of monies unconstitutionally withheld from the Plaintiff by the Defendant, computed as follows:

	Monthly Connecticut ADC Allowance for Food, Clothing and Personal Incidentals		Rent Actually Paid from Nov. 1, 1966 to June 27, 1967
Nov. (beginning Nov. 1, 1966)	$64.65	Mother & 1 child under 2 yrs. of age)	
Dec.	$64.65	" "	
Jan.	$64.65	" "	
Feb.	$86.65	(Mother & 2 children under 2 yrs. of age)	
March	$86.65	" "	
April	$86.65	" "	" 35 weeks @ $12.00 a week
May	$86.65	" "	
June (ending June 27, 1967)	$78.16		$420.00
	$618.71		$420.00
			618.71
			$1,038.71

Less amount paid to Plaintiff by Catholic Family Services from 1-25-67 to 6-27-67 (23 weeks at $31.60 a week) 726.80

TOTAL $ 311.91

Dated at Hartford, Connecticut, this 30th day of June, 1967.

J. JOSEPH SMITH
United States Circuit Judge

M. JOSEPH BLUMENFELD
United States District Judge

"I dissent" for reasons given in my opinion.

T. EMMET CLARIE
United States District Judge

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FILED
FEB 20 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

WALTER E. WASHINGTON, *et al., Appellants,*

v.

MINNIE HARRELL, *et al., Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No.

WALTER E. WASHINGTON, *et al., Appellants,*

v.

MINNIE HARRELL, *et al., Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

Appellants appeal from the decree of the United States District Court for the District of Columbia, entered November 28, 1967, declaring certain provisions of the District of Columbia Public Assistance Act of 1962, *infra*, repugnant to the Constitution of the United States, and permanently enjoining their enforcement. The three-judge

court which rendered the decree was convened pursuant to 28 United States Code, § 2282. Appellants submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that the question presented is so substantial as to require plenary consideration, with briefs on the merits and oral argument, for its resolution.

OPINION BELOW

The majority and dissenting opinions of the three-judge District Court have not yet been reported and are appended hereto as Appendix A.

JURISDICTION

These are class actions seeking (1) declaratory judgments that those provisions of the District of Columbia Public Assistance Act of 1962, *infra*, which make residence in the District of Columbia for one year a condition for eligibility for public assistance are unconstitutional and (2) injunctions permanently enjoining the enforcement of such provisions. The jurisdiction of the District Court was invoked under the provisions of District of Columbia Code, § 11-521 (1967), and 28 United States Code, § § 1343, 2201, 2282, and 2284. The decree of the three-judge court sought to be reviewed was entered on November 28, 1967, and notices of appeal were filed in that court on December 22, 1967. The jurisdiction of the Supreme Court to review the decree by direct appeal is conferred by 28 United States Code, § 1253. The following decisions sustain the jurisdiction of the Supreme Court: *Zemel* v. *Rusk*, 381 U. S. 1 (1965); *United Public Workers* v. *Mitchell*, 330 U. S. 75 (1947).

QUESTION PRESENTED

Whether the provisions of the District of Columbia Public Assistance Act of 1962, *infra*, which make residence

in the District of Columbia for one year a condition for eligibility for public assistance are repugnant to the Constitution of the United States.

STATUTE INVOLVED

The District of Columbia Public Assistance Act of 1962, 76 Stat. 914, Pub. L. 87-807, § 4, District of Columbia Code, § 3-203 (1967), provides, in pertinent part:

> "Public Assistance shall be awarded to or on behalf of any needy individual who either (a) has resided in the District for one year immediately preceding the date of filing his application for such assistance; or (b) who was born within one year immediately preceding the application for such aid, if the parent or other relative with whom the child is living has resided in the District for one year immediately preceding the birth * * *."

STATEMENT OF THE CASE

Appellants are officials of the District of Columbia government charged with the responsibility of administering the District of Columbia Public Assistance Act of 1962, *supra*. Appellees are residents of the District of Columbia whose applications for public assistance were denied by appellants, pursuant to the provisions of said Act, because they had not resided in the District of Columbia for one year immediately preceding the dates of their applications. Contending that the provisions of the Act under which their applications were considered and denied are unconstitutional, appellees, by actions brought in the United States District Court for the District of Columbia, sought declaratory and injunctive relief. The actions were consolidated and a three-judge court was convened pursuant to 28 United States Code, § 2282. Following a hearing, the court (with

one judge dissenting) held those provisions of the Act which make residence in the District of Columbia for one year a condition for eligibility for public assistance repugnant to the Constitution of the United States and permanently enjoined appellants from enforcing or giving any legal effect to such provisions.

SUBSTANTIALITY OF QUESTION PRESENTED

In holding the challenged provisions of the District of Columbia Public Assistance Act of 1962, *supra*, repugnant to the Constitution of the United States, the majority of the three-judge District Court relied upon "* * * considerations which stem primarily from the equal protection of the laws guaranteed by the Fourteenth Amendment and applicable in this jurisdiction by reason of the Due Process Clause of the Fifth Amendment" (Appendix A, p. 6; footnote omitted). The majority, however, "* * * readily acknowledge there is no absolute certainty about the reach of the Equal Protection Clause in this area of the law" (Appendix A, p. 16-17. As evidenced by both the majority and dissenting opinions, the question presented is a close one respecting which the law is not settled. Indeed, the opinion of the majority appears to be in clear conflict with the holding in *Flemming* v. *Nestor*, 363 U. S. 603, 611 (1960).

More than three-fourths of the States have enacted legislation substantially similar to the challenged provisions of the District of Columbia Public Assistance Act of 1962, *Supra* (Appendix A, p. 12, 29). Obviously, the decision of the Supreme Court in this case will materially affect the constitutionality of all such legislation.

Three-judge District Courts have recently decided several cases involving challenges to the constitutionality of similar State legislation (Appendix A, p. 6). One such case, *Shapiro* v. *Thompson*, No. 813, October Term, 1967, is presently pending before the Supreme Court and other cases are on their way there.

For these reasons, the question presented is so substantial as to require plenary consideration, with briefs on the merits and oral argument, for its resolution.

Respectfully submitted.

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1497-67

MINNIE HARRELL, et al., *Plaintiffs*,

CLAY MAE LEGRANT, *Plaintiff-Intervenor*,

v.

WALTER N. TOBRINER, et al., *Defendants*.

Civil Action No. 1579-67

VERA M. BARLEY, et al., *Plaintiffs*,

v.

WALTER N. TOBRINER, et al., *Defendants*.

Civil Action No. 1749-67

GLORIA JEAN BROWN, et al., *Plaintiffs*,

CLAY MAE LEGRANT, *Plaintiff-Intervenor*,

v.

WALTER N. TOBRINER, et al., *Defendants*.

OPINION

David H. Marlin, of Washington, D. C., and Laurens H. Silver, of Washington, D. C., for plaintiffs.

Charles T. Duncan, Corporation Counsel, and John A. Earnest and John H. Suda, Assistant Corporation Counsel, for defendants.

Before BAZELON, Chief Circuit Judge, FAHY, Senior Circuit Judge, and HOLTZOFF, District Judge.

FAHY, Circuit Judge. Plaintiffs and intervenor,[1] all now to be referred to as plaintiffs, in slightly differing factual situations applied for public assistance under the District of Columbia Public Assistance Act of 1962, Title 3, Chapter 2, D.C. Code (1967). Defendants, who have official responsibility in the matter, denied the applications. The sole ground of denial was that plaintiffs and the minor children on whose behalf they sought aid had not complied with the residence requirements of D.C. Code § 3-203(a), (b) (1967), set forth in the margin insofar as pertinent to this case,[2] and with the regulations promulgated pursuant to the statute. Plaintiffs seek relief by declaratory judgments and injunctions against enforcement by defendants of such residence requirements.[3] The complaints proceed on two theories, first, that Section 3-203 vests a discretion in the defendants to disregard the one-year residence requirements, and they have not exercised such discretion, and, second, that if there is no such discretion the one-

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[1] See note 3 *infra*.

[2] § 3-203. Eligibility for public assistance.

Public assistance shall be awarded to or on behalf of any needy individual who either (a) has resided in the District for one year immediately preceding the date of filing his application for such assistance; or (b) who was born within one year immediately preceding the application for such aid, if the parent or other relative with whom the child is living has resided in the District for one year immediately preceding the birth; or (c) is otherwise within one of the categories of public assistance established by this chapter: . . .

[3] In the case of plaintiff Minnie Harrell and her co-plaintiffs neither she nor they had resided in the District a year when she applied. In the case of Gloria Jean Brown, et al., who sues on behalf of three children, the children had not resided a year here when application for them was made. In the case of Vera M. Barley the denial of her application was on the ground that her residence at St. Elizabeths Hospital for a period which otherwise was more than adequate could not be considered because under the regulations residence could not be "gained" while one was confined to a public institution. She has been deemed competent since September 15, 1965, but is without financial resources sufficient to obtain care in a foster home, which prevents her, without public assistance, leaving St. Elizabeths. In the case of intervenor Clay Mae LeGrant neither she nor her children had resided here a year when applications for them were made.

year residence requirements of Section 3-203 are constitutionally invalid.

This three-judge District Court was convened pursuant to 18 U.S.C. § 2282[4] and was composed under the provisions of 18 U.S.C. § 2284.

On September 11, 1967, after argument, we granted the motion of plaintiffs for a preliminary injunction pendente lite or until the further order of the court.[5] We accompanied our order with Findings of Fact and Conclusions of Law, the findings setting forth in detail the factual situation of each plaintiff, which still prevails in essential respects. The matter is decided now on motions for summary judgment submitted by both plaintiffs and defendants, enabling us to decide the merits, there being no genuine issues of material fact requiring an evidentiary hearing.

I

We agree with defendants that Section 3-203 does not grant defendants a discretion to disregard the one-year residence requirements applicable to plaintiffs. This construction is supported not only by the language of the

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[4] 28 U.S.C. § 2282:
An interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

[5] The order in its operative part reads:
That the defendants, Walter N. Tobriner, individually and as President of the Board of Commissioners of the District of Columbia; John B. Duncan and Robert E. Mathe, individually and as members of the Board of Commissioners of the District of Columbia; Winifred G. Thompson, individually and as Director of the Department of Public Welfare of the District of Columbia; Donald Gray, individually and as Chief of the Public Assistance Division, Department of Public Welfare of the District of Columbia; and Vivian Jodon, Chief of Intake, Public Assistance Division, Department of Public Welfare of the District of Columbia, be, and hereby are, enjoined, pendente lite or until further order of the court, from denying public assistance to plaintiffs by reason of any of the one-year residence requirements of Title 3, Section 203, of the District of Columbia Code (1967) and regulations thereunder. [District Judge Holtzoff's dissent was noted on the order.]

statute but also by its legislative history. The Senate District of Columbia Committee in its Report on the Act stated that one of the congressional purposes was to

> (c) Make uniform in all categories a 1-year residence requirement for public assistance eligibility. (S. Rep. No. 844, 87th Cong., 1st Sess. (1961).).

The administrators of the program have consistently interpreted the statute as the legislative history thus indicates Congress intended, that is, that the language "public assistance shall be awarded" to those who meet the one-year conditions means that the assistance is not to be granted unless those conditions are met. This consistent and reasonable interpretation by those charged with the duty of administering the statute is entitled to great weight. *Zemel* v. *Rusk*, 381 U.S. 1, 11; *Udall* v. *Tallman*, 380 U.S. 1, 16; *United States* v. *American Trucking Association*, 310 U.S. 534, 549. Moreover, we independently interpret the language used by Congress in like manner. It becomes our duty therefore to decide the validity of the challenged parts of the statute as so construed.[6]

II

A court approaches its responsibility of passing upon the constitutional validity of an Act of Congress aware that Congress also interprets the Constitution. This is so even though Congress' judgment is manifested, as in

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[6] None of the parties questions the application of Section 2282 on the ground that the Code provision is not an "Act of Congress" within the meaning of Section 2282. In this connection see *Hobson* v. *Hansen*, 265 F. Supp. 902. *Flemming* v. *Nestor*, 363 U.S. 603, is not to the contrary, for there the issue of constitutional validity of the statute arose and was decided under judicial review procedures established by the statute under which the determination arose, not by direct suit such as we have to enjoin the operation of a statute and regulations thereunder. In this connection we bear in mind also the three-judge District Court requirements of 18 U.S.C. § 2281, applicable to the challenge of state-wide legislation. The District of Columbia, though not a state, is comparable to a state in considering this problem.

the present case, merely by passage of the legislation rather than by explicit treatment of the constitutional question. Moreover, as Mr. Justice Goldberg stated for the Court in *Kennedy* v. *Mendoza-Martinez,* 372 U.S. 144, 159:

> Since the validity of an Act of Congress is involved, we begin our analysis mindful that the function we are now discharging is "the gravest and most delicate duty that this Court is called upon to perform." *Blodgett* v. *Holden,* 275 U.S. 142, 148 (separate opinion of Holmes, J.). This responsibility we here fulfill with all respect for the powers of Congress, but with recognition of the transcendent status of our Constitution.

In *Trop* v. *Dulles,* 356 U.S. 86, 103-04, Mr. Chief Justice Warren had stated the matter as it must be considered:

> The provisions of the Constitution are not time-worn adages or hollow shibboleths. They are vital, living principles that authorize and limit governmental powers in our Nation. They are the rules of government. When the constitutionality of an Act of Congress is challenged in this Court, we must apply those rules. If we do not, the words of the Constitution become little more than good advice.
>
> When it appears that an Act of Congress conflicts with one of these provisions, we have no choice but to enforce the paramount command of the Constitution. We are sworn to do no less. . . . We do well to approach this task cautiously, as all our predecessors have counseled. But the ordeal of judgment cannot be shirked.

In line with the caution thus admonished, applicable to us certainly no less than to the Supreme Court, we should construe the challenged portions of Section 3-203 so as to avoid a serious constitutional question if rea-

sonably able to do so. *United States* v. *Rumely*, 345 U.S. 41, 45. But it seems clear to us that Congress intended to impose one-year residence requirements as conditions, similar to conditions prevailing in numerous other jurisdictions. There is no evidence of a congressional intent to depart from a rather widespread legislative pattern in this area. This pattern lends support to defendants' interpretation of Section 3-203 as precluding a discretion on their part to disregard the requirements. Our agreement with defendants' interpretation requires us to reach the constitutional question.

Any weight the legislative pattern gives to defendants' constitutional position, however, as distinguished from their statutory interpretation, we think is overcome by considerations which stem primarily from the equal protection of the laws guaranteed by the Fourteenth Amendment and applicable to this jurisdiction by reason of the Due Process Clause of the Fifth Amendment.[7]

Notwithstanding the frequent use of such a residence condition, only recently has it come before federal courts for decision as to its validity. Nine federal judges, in three separate cases, with one judge dissenting, have recently considered the constitutional questions involved. *Thompson* v. *Shapiro*, 270 F. Supp. 331 (a three-judge District Court of the District of Connecticut); *Green* v. *Department of Public Welfare*, 270 F. Supp. 173 (a three-judge District Court of the District of Delaware); and *Smith* v. *Reynolds*, —— F. Supp. —— (a three-judge District Court of the Eastern District of Pennsylvania). In *Thompson* and *Green* the residence requirements, respectively, of Connecticut and Delaware, were held unconstitutional. In *Smith* v. *Reynolds* a final decision has not

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[7] Denial of equal protection offends the Due Process Clause of the Fifth Amendment, applicable to this jurisdiction, as well as the Equal Protection Clause of the Fourteenth, applicable in terms to the States. *Bolling* v. *Sharpe*, 347 U.S. 497; *Schneider* v. *Rusk*, 377 U.S. 163, 168.

been reached, but enforcement of such a requirement in Pennsylvania has been enjoined preliminarily on constitutional grounds.

In *Thompson* the court first concluded the provision constituted an arbitrary classification in violation of the Fourteenth Amendment's prohibition against state abridgment of the privilege and immunity of a citizen of the United States to enjoy the liberty to travel interstate. The court relied heavily upon *Edwards* v. *California,* 314 U.S. 160. The court also relied upon a more general liberty of the citizen to travel, upheld by the Supreme Court in the passport cases, including *Kent* v. *Dulles,* 357 U.S. 116, 126-127, and *United States* v. *Guest,* 383 U.S. 745, 759. The *Thompson* court said:

> the right to travel exists and included within its dimensions is the right to establish residence in Connecticut. Denying to the plaintiff even a gratutious benefit because of her exercise of her constitutional right effectively impedes the exercise of that right.

270 F. Supp. at 336.

Second, the court in *Thompson* decided that the Equal Protection Clause of the Fourteenth Amendment was violated:

> . . . the classifications of one year's residence or a job are not reasonable in light of the purpose of § 17-2d because again there is no showing that those applicants will be lesser burdens than applicants without jobs or one year's residence. Section 17-2d, in brief, violates the equal protection clause because even if its purpose were valid, [to protect the finances of the states] which it is clearly not, the classifications are unreasonable.

Id. at 338.

In *Green* the court, in holding invalid the Delaware one-year requirement for public assistance, said that the test under the Equal Protection Clause was whether the classification based on residence was reasonably related to the purpose of the statute, citing *Morey* v. *Doud*, 354 U.S. 457. The court then pointed out that the purpose of the public assistance program was "'to promote the welfare and happiness of all people of the State, by providing public assistance to all of its needy and distressed, that assistance shall be administered promptly and humanely with due regard for the preservation of family life . . .'" 270 F. Supp. at 177.

With these purposes in mind the court considered the reasonableness of the one-year residence provision in relation to those purposes, holding,

> It is evident to us that as to these families living in Delaware for less than one year the denial of public assistance fails to carry out the stated purposes for the Public Assistance Code. It in fact tends to frustrate them. The residency requirement prevents prompt assistance to some of the State's needy and distressed and to that extent is the antithesis of "humane." It also necessarily results in pressure on the solidarity of the family unit. Nor given these circumstances is it an acceptable answer to say that until they are here one year such persons are not a part of the state's needy and distressed. The discrimination based on length of residency thus finds no constitutional justification in the purpose declared in the statute itself.

We have given first consideration to the above three-judge District Court cases because they are recent decisions on precisely the same subject and are not decisions of more remote application. We must be certain, however, that they comport with principles established by the Supreme Court. Although the Court has not dealt with

this particular situation its decisions in other areas reveal the applicable principles, and to them we now turn.

In *McLaughlin* v. *Florida*, 379 U.S. 184, 191, our task in interpreting the Equal Protection Clause is stated as follows:

> The court must reach and determine the question whether the classifications drawn in a statute are reasonable in light of its purpose. . . .

Carrington v. *Rash*, 380 U.S. 89, 93, restated this test in exactly the same language.

In *Bates* v. *Little Rock*, 361 U.S. 516, 525, a case involving First Amendment rights of association, the Court declared that,

> When it is shown that state action threatens significantly to impinge upon constitutionally protected freedom it becomes the duty of this Court to determine whether the action bears a reasonable relationship to the achievement of the governmental purpose asserted as its justification.

In *Gulf, Colorado & Santa Fe Ry.* v. *Ellis*, 165 U.S. 150, 155 (1897), the power of classification was recognized as permitted by the Fourteenth Amendment, but the Court added that: "it is equally true that such classification cannot be made arbitrarily."

More specifically, in *Truax* v. *Raich*, 239 U.S. 33, 42 (1915), the Court stated that "reasonable classification implies action consistent with the legitimate interests of the State. . . ."

A principal purpose of Section 3-203 obviously is to provide public assistance to the needy. Moreover, the immediately preceding section provides that the entire public assistance chapter shall be administered so as to provide the maximum cooperation with other agencies rendering services in order "to maintain and strengthen

family life and to help applicants for public assistance and recipients to attain self-support or self-care." D.C. Code § 3-202(b)(1) (1967). These purposes constitute the keystone of the legislation. A bona fide resident of the District of Columbia for six months who is indigent and without the means by which to support herself and her children is no less in need of public assistance than an indigent who has been here for a full year. The basic purposes of the legislation—public assistance to those in need, maintenance and strengthening of family life, achievement of self-support and self-care—are not more faithfully served by withholding aid until applicants have lived here for twelve months. Indeed, the denial of assistance for an entire year to otherwise qualified recipients may only erode values which the statute tries to promote. The spread over a year's time of the evils which public assistance seeks to combat may mean that aid, when it becomes available, will be too late: Too late to prevent the separation of a family into foster homes or Junior Villages; too late to heal sickness due to malnutrition or exposure; too late to help a boy from succumbing to crime.[8]

Section 3-203 creates two classes of persons: those who have resided in the District of Columbia for one year or longer, and those who have resided here for less than one year. Although the Supreme Court has recognized that a "legislature is free to make classifications in the application of a statute which are relevant to the legislative purpose," it has emphasized that the "ultimate test of validity is not whether the classes differ but whether

[8] Recent studies have confirmed:

Burglary, robbery, and serious assaults occur in areas characterized by low income, physical deterioration, dependency, racial and ethnic concentrations, broken homes, working mothers, low levels of education and vocational skill, high unemployment, high proportions of single males, overcrowded and substandard housing, high rates of tuberculosis and infant mortality, low rates of home ownership or single family dwellings, mixed land use, and high population density. *President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society* 35 (1967).

the differences between them are pertinent to the subject with respect to which the classification is made." *Asbury Hospital* v. *Cass County*, 326 U.S. 207, 214. If a six-month resident is denied the assistance given to a one-year resident, in circumstances in which each is otherwise within the requirements of the statute, the former is denied the equal protection of the law, for the clearly different treatment has no reasonable relation to the basic legislative purposes. The disqualifying requirement applicable to plaintiffs thus engrafts upon the legislation an invalid provision. The same reasons which led the courts in the *Thompson* and *Green* cases, and pendente lite in the *Smith* case, to hold comparable provisions invalid as classifications without a reasonable relation to the purposes of the legislation apply to our cases.

III

We consider now arguments which have been urged in support of the residence requirement.

It is said that Congress in gratuitously providing for assistance may not be held to constitutional standards. The decisions are to the contrary. In *Sherbert* v. *Verner*, 374 U.S. 398, 404, the Supreme Court held that the fact that "unemployment compensation benefits are not appellant's 'right' but merely a 'privilege'" does not save a statute limiting such rights from "constitutional infirmity."[9] There is no indication in our cases that Congress desired unequal protection of the laws. Congress viewed the eligibility provision as justified. Our judicial problem is to determine the reasonableness of the difference in treatment which the challenged requirement imposes upon those in need of public assistance. There is no escape from the proposition that, in carrying forward a comprehensive program of this character, restrictions having no reasonable relationship to the basic purposes of the program are

[9] See also Note, 73 Harv.L.Rev. 1595, 1599-1602 (1960).

not immune from attack because the Congress was not under legal obligation to inaugurate the program. The *Thompson*, *Green*, and *Smith* cases, to which we have referred in other respects, support this position.

Defendants also contend that the restriction is reasonable because it is designed to protect this jurisdiction from an influx of persons seeking more generous public assistance than might be available elsewhere. Congress made no finding to that effect. As we have seen,[10] the reason for the one-year residence requirement given in the Report of the Senate Committee was uniformity. Assuming, however, that Congress had in mind the protective purpose advanced by defendants, we are reminded that the historical origin of the localized character of public assistance was the Elizabethan Poor Laws.[11] These laws enshrined the notion of "settlement," from which the concept of residence descended. Only those who were settled there were entitled to receive relief from a community. No doubt due in large part to the influence of these English laws—perhaps a subconscious influence—a number of our state legislatures adopted the idea of a minimum period of residence as a prerequisite to eligibility. But the Supreme Court pointed out more than twenty-five years ago that

> the theory of the Elizabethan poor laws no longer fits the facts. Recent years, and particularly the past decade, have been marked by a growing recognition that in an industrial society the task of providing assistance to the needy has ceased to be local in character.

Edwards v. *California*, 314 U.S. 160, 174-75.

Another difficulty in accepting the protective assumption as giving constitutional support to the challenged

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[10] *Supra*, p. 5.

[11] The Poor Relief Act, 1601, 43 Eliz. 1, c. 2; The Poor Relief Act, 1662, 13 & 14 Car. 2, c. 12.

provision, is the speculative character of the assumption from a factual standpoint. In 1956, the Deputy Commissioner of Social Welfare of the State of New York, which has not had a minimum period of residence for nearly a century, stated that in the preceding year only two per cent of all public assistance recipients had lived in New York for less than one year.[12] In 1963, the Moreland Commission on Public Welfare in New York, after a lengthy study of the entire fabric of public assistance, stated that it was opposed to residence requirements on the ground that "the present laws [designed to prevent abuse] are sufficient to protect the taxpayer without penalizing the unfortunate."[13] "To assume that people are influenced to move or not to move according to the availability of help on a relief basis is to misunderstand the dynamics of human behavior."[14] This is especially true in the United States. A committee of Congress has stated that "[g]eographical mobility has always been a habit of the American people."[15]

Even if some citizens do enter a state in order to obtain greater welfare aid, the possibility of this effect, alone, is not in the circumstances sufficient to require the court to sustain the residence condition. As against a similar contention in the *Green* case, the court interposed the decision of the Supreme Court in *Edwards* v. *California, supra,* saying that such a ground was "a constitutionally impermissible basis for separate state treatment." The court continued:

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[12] Kasius, *What Happens in a State Without Residence Requirements,* in Residence Laws: Road Block to Human Welfare 19-20 (1956).

[13] *State of New York, Moreland Commission on Welfare, Public Welfare in the State of New York* 27-28 (1963). See also Hyde, *The Trouble with Residence Laws,* 16 *Public Welfare* 103, 105 (1958).

[14] Kasius, note 12 *supra,* at 20. See also Moreland Commission Report, *supra* note 13, at 28: "... welfare aid is not a lure for people on the move, and ... migration to states where living is attractive is high *despite* strict residence requirements." (Emphasis in original.)

[15] *House Select Comm. Investigating National Defense Migration, Analysis of Material Bearing on the Economic Social Aspects of the Case of Edwards v. California,* 77th Cong., 1st Sess. 2 (1941).

> The protection of the public purse, no matter how worthy in the abstract, is not a permissible basis for differentiating between persons who otherwise possess the same status in their relationship to the State of Delaware.

Assuming that a provision to prevent abuse of the public assistance program would be valid—a case of abuse is not before us—the challenged provision sweeps before it all who have less than the required residence, including bona fide residents who had come to this jurisdiction for reasons disassociated entirely from a desire to obtain relief. This is too broad to be sustained in light of the resulting inequality of treatment:

> [A]ssuming, for the purpose of argument only, that the basic prohibition is constitutional, it does not follow that there is no constitutional limit to the means which may be used to enforce it.

Oyama v. *California*, 332 U.S. 633, 646-47; and see concurring opinion of Mr. Justice Brennan in *Trop* v. *Dulles*, 356 U.S. at 114, where he discussed the need of legislation to achieve desired ends by alternative methods open to less objection.

In *Thompson*, in language particularly applicable to our case, it is said:

> [I]f there were here a time limit applied equally to all, for the purpose of prevention of fraud, investigation of indigency or other reasonable administrative need, it would undoubtedly be valid. Connecticut's Commission of Welfare frankly testified that no residence requirement is needed for any of these purposes.

270 F. Supp. at 33.[16] And see *Green*, where the desire to avoid payments tainted with fraud or based on insuffi-

[16] Clearly administrative convenience is not in and of itself adequate support for infringement of a constitutional right. *Harman* v. *Forssenius*, 380 U.S. 528, 542; *Schneider* v. *Rusk*, 377 U.S. 163, 167.

cient information, which the court said were of course legitimate ends, did not justify the one-year residence requirement, "particularly in view of the consequences to persons in need. ....." 270 F. Supp. at 177. Whether or not a narrower provision designed to prevent abuse would be valid would of course depend upon its terms.[17]

The choice of twelve months denies plaintiffs the equal protection of the laws because, in a manner inconsistent with the basic purpose of the legislation, it bars them from assistance granted to others. That basic purpose, simply stated, is to aid members of the community who are in need. That the residence requirement serves other purposes—ease of administration, or discouragement of movement to the jurisdiction—does not help defendants when the consequence is to defeat the primary purpose of the legislation. Other means to accomplish secondary purposes must be sought. This is especially true when the discrimination perpetuates the conditions the legislation is designed to cure.[18]

It is also said by defendants that Congress in 42 U.S.C. §602(b), where the basis for the federal contribution to state public assistance programs is set forth, has approved the one-year residence requirements of states. The fact is that Section 602(b) merely provides, in this connection, that the Secretary of Health, Education and Welfare shall not approve any plan which denies aid on the basis of an eligibility requirement of more than a year.

As to the possibility that the legislature intended to confine assistance to domiciliaries of the jurisdiction and

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[17] The reliance of defendants in this connection upon *People* v. *Lyons*, 374 Ill. 557, 30 N.E.2d 46 (1940), does not take into account the necessity of avoiding constitutional infringement by channeling the legislation so as to meet more directly the abuse sought to be avoided. Moreover, with great respect for the Illinois court, the more recent decisions of the federal courts to which we have referred are more in harmony with our views in this matter.

[18] See Moreland Commission Report, *supra* note 13, at 28: "Administratively, . . . the cost of investigating cases and enforcing residence laws costs more money than is saved."

that the one-year residence provides an objective legislative test of such status, the *Green* court held:

> the one year residency requirement prevents many applicants from obtaining assistance even though they are clearly living in Delaware with an intention to remain indefinitely. . . .

The court left open the question "whether a state could constitutionally confine the benefits of its public assistance programs to its own domiciliaries." We also are not called upon to decide this question, for it is not disputed that the plaintiffs are bona fide domiciliaries of the District who came for reasons disassociated from the desire to obtain relief not elsewhere available.[19]

Finally, it is suggested that if the one-year residence provision is invalidated the whole program falls with it. We hold otherwise. No such result was held to follow in the *Thompson*, *Green* and *Smith* cases. It would not be reasonable to impute such an intention to Congress. Moreover, Section 203 is part of Chapter 2 of Title 3 of the Code, and Section 223 of the chapter conclusively demonstrates Congress entertained no such intention. Section 223 is explicit:

> If any provision of this chapter or the application thereof to any person or circumstance is held invalid, the remainder of the chapter and the application of such provision to other persons or circumstances shall not be affected thereby.

Views which support the validity of the one-year condition are well advanced by our dissenting brother, and by Judge Clarie, dissenting in *Thompson*. We readily

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[19] The regulation under which plaintiff Vera M. Barley was denied assistance, based on her residing in a public institution, falls with the reasoning of our decision applicable to the other plaintiffs, especially in light of the factual situation of plaintiff Barley as outlined in footnote 3, *supra*.

acknowledge there is no absolute certainty about the reach of the Equal Protection Clause in this area of the law. "But the ordeal of judgment cannot be shirked." *Trop* v. *Dulles, supra* at 104. We are encouraged to make the judgment we do not only by the decisions in *Thompson, Green* and *Smith,* but by the over-all salutary action of Congress in entering into the welfare programs of which Section 3-203 is a part. This national movement toward assistance where assistance is needed, and the human terms of the problem, permit the court somewhat greater latitude in deciding that this difference in the treatment of those in our midst who are in need amounts to unequal protection of the laws than if the treatment were with respect to some matter less critical to their living conditions.

An appropriate judgment will be entered based on our ruling that the one-year residence requirements of Section 3-203(a)(b) of our Code are invalid in application to plaintiffs and those in like circumstances. Counsel for the parties are requested to seek agreement on the form of judgment, taking into consideration any changes in the parties who are defendants due to reorganization of the Government of the District of Columbia.

/s/ DAVID L. BAZELON
Chief Circuit Judge

/s/ CHARLES FAHY
Senior Circuit Judge

Dated: November 2, 1967.

BAZELON, *Chief Judge,* concurring: I concur in Judge Fahy's opinion and would only emphasize that equal protection requires a statutory classification to be reasonably related to a "proper governmental objective," *Bolling* v. *Sharpe,* 347 U.S. 497 (1954), and that to deter

indigents from settling in the District of Columbia is not such an objective, *Edwards* v. *California*, 314 U.S. 160 (1941).

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HOLTZOFF, District Judge, dissenting. I respectfully dissent from the conclusion of the majority that the District of Columbia statute prescribing a residence requirement of one year for eligibility for receiving public assistance is unconstitutional, as transgressing the Equal Protection of the Laws Clause of the Fourteenth Amendment, and as interfering with freedom of travel. In my opinion the enactment is a valid exercise of legislative power.

Each of the three consolidated actions now before the Court was instituted by an applicant for public assistance from the District of Columbia, whose request was denied by the local Welfare authorities, on the ground that she was ineligible because she had not been a resident of the District of Columbia for at least one year. In each instance, the plaintiff seeks a judgment setting aside the adverse action of the local Public Welfare authorities; requiring them to pass on the application for relief without regard to the residence requirement; and declaring the statutory provision imposing the residence requirement to be unconstitutional.

The District of Columbia statute involved in these cases is D.C.Code § 3-203, the pertinent provisions of which read as follows:

§ 3-203. *Eligibility for public assistance.*

> "Public assistance shall be awarded to or on behalf of any needy individual who either (a) has *resided in the District for one year immediately preceding the date of filing his application for such assistance;* or (b) who was born within one year immediately preceding the application for such aid, if the parent or other relative with

whom the child is living has resided in the District for one year immediately preceding the birth; or (c) is otherwise within one of the categories of public assistance established by this chapter: . . ." [Emphasis supplied.]

The constitutionality of clauses (a) and (b) of the above statute is attacked in these actions.

In two of these cases the plaintiff is a mother with dependent children. The funds out of which public assistance for dependent children is disbursed by the States (including the District of Columbia) are in part provided by the individual States and in part by a grant from the Federal Government, authorized by the Social Security Act, Subchapter IV, entitled, "Grants to States for Aid and Services to Needy Families with Children", 42 U.S.C. § 601 *et seq.* In order to be eligible for a Federal grant for this purpose, a State is required to submit a plan to the Secretary of Health, Education and Welfare, containing certain specified provisions, 42 U.S.C. § 602(a). Subsection (b) of that section contains the following requirement:

"(b) The Secretary shall approve any plan which fulfills the conditions specified in subsection (a) of this section, except that he shall not approve any plan which imposes as a condition of eligibility for aid to families with dependent children, a residence requirement which denied aid with respect to any child residing in the State (1) who has resided in the State for one year immediately preceding the application for such aid, or (2) who was born within one year immediately preceding the application, if the parent or other relative with whom the child is living has resided in the State for one year immediately preceding the birth."

In other words, the Social Security Act expressly authorizes States receiving Federal grants for aid to depend-

ent children, to impose residence requirements for eligibility for relief, with the limitation that such residence requirements shall not exceed one year. Consequently, insofar as aid to dependent children is concerned, the residence requirement exacted by the District of Columbia was expressly authorized by the Social Security Act, under which Federal grants are made to the States for that purpose. While the complaints in these actions do not expressly attack the validity of this provision of the Social Security Act, nevertheless, by necessary implication, a ruling that the District of Columbia statute is unconstitutional must also strike down in its wake the provision of the Social Security Act authorizing the enactment of such local requirements.

Statutes imposing specific residence prerequisites for receiving relief have been in existence in many States for a long time. They are not restricted to aid to dependent children, but in a broad scope are generally applicable to relief payments of all kinds. The usual residence requirement is one year. Without any attempt at making an exhaustive enumeration, a partial survey shows that the following States, among others, impose a residence requirement of at least one year as a qualification for receiving relief of any type: Maryland, West Virginia, North Carolina, South Carolina, Ohio, Illinois, Michigan, Wisconsin, Nebraska, Kansas, Texas, Colorado, Utah and Oregon. Virginia imposes such a condition for several types of relief. Such provisions are accepted as appropriate and prudent, if not indispensable, features of any system of administering relief to needy persons. The obvious purpose of such restrictions is to minimize the likelihood of imposition and abuses, even though at times they result in hardship to some individuals. The wisdom, policy, desirability, and expediency of such conditions are not within the purview of the judiciary, but must be determined by the legislature. The powers of Govern-

ment are vested primarily in an elective Legislative body and an elective Executive. Were they to be shifted in whole or in part to the courts, composed of members holding office by permanent tenure, we would cease to have a popular form of government. An oligarchy would supplant it, no matter how benevolent.

If the conclusion of the majority is sound, the necessary consequence would be that all such local statutes must be deemed invalid and that no specific residence requirement may be constitutionally imposed by the States as eligibility for welfare payments. The relief systems of most of the States would have to be revamped, transformed, and reorganized.

While the number and nature of statutes relating to welfare legislation that would be rendered invalid under the ruling of the majority need not deter the courts from declaring all of them unconstitutional, if in fact they clearly transgress some constitutional limitation, nevertheless, the number and extent of such statutes and the fact that they are an accepted feature of welfare legislation generally, should lead the court to pause. Doubts should be resolved in favor of validity, instead of upsetting all over the country well-established local plans for administering relief funds.

Members of the judiciary must not be influenced by their own views of the wisdom, expediency, or desirability of legislation, or by their own attitude toward charity. They must limit themselves to considering objectively and solely the constitutional power to enact the statute that is being challenged. As was said by Cardozo in *The Paradoxes of Legal Science*, "Legislature as well as court is an interpreter and a guardian of constitutional immunities." (p. 121).

While in determining justiciable cases and controversies brought before the Courts by persons having standing to sue, the courts in case of a conflict between an applicable

statute and a pertinent constitutional provision, must have recourse to the Constitution as the supreme law of the land and ignore the statute, thereby adjudging the statute to be unconstitutional, the power to render such a decision must be exercised with caution, circumspection and deliberation. Statutes may not be lightly set aside by the judiciary on the theory that they contravene some constitutional limitation. It is a basic principle that there is a strong presumption of constitutionality as to every legislative enactment. This presumption must be clearly overcome before a statute may be declared invalid. The presumption of validity is not a mere form, but a potent rule that must be actively applied by the courts. Again, as was said by Cardozo,[1] "The presumption of validity should be more than a pious formula, to be sanctimoniously repeated at the opening of an opinion and forgotten at the end."

Chief Justice Marshall developed and expounded the doctrine that if in a justiciable controversy instituted by a party having standing to sue, it is determined that an applicable statute is in conflict with the Constitution the issues should be determined in accordance with the Constitution and the statute declared invalid, *Marbury* v. *Madison,* 1 Cranch. 137. He, nevertheless, called for caution in the exercise of this prerogative and announced that it should be exerted only if the conviction of incompatibility was clear and strong. He said in *Fletcher* v. *Peck,* 6 Cranch. 87, 128:

> "The question, whether a law be void for its repugnancy to the constitution, is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative, in a doubtful case. The court, when impelled by duty to render such a judgment, would be unworthy of its station, could it be unmindful of the solemn obli-

[1] The Paradoxes of Legal Science, p. 125.

> gations which that station imposes. But it is not on slight implication and vague conjecture, that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other."

He reiterated this doctrine in *Brown* v. *Maryland,* 12 Wheat. 419, 436:

> "It has been truly said, that the presumption is in favor of every legislative act, and that the whole burden of proof lies on him who denies it constitutionality."

Chief Justice Waite summarized the same principle in the following manner, *Sinking-Fund Cases,* 99 U.S. 700, 718:

> "It is our duty, when required in the regular course of judicial proceedings, to declare an act of Congress void if not within the legislative power of the United States; but this declaration should never be made except in a clear case. Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule."

Coming down to our own times, Mr. Justice Stone in *Hardware Dealers Mutual Fire Insurance Co.* v. *Glidden Co. et al.,* 284 U. S. 151, 158, emphasized that when legislation deals with a subject that is within the scope of legislative power, "the presumption of constitutionality is to be indulged."

In *United States* v. *National Dairy Corp.*, 372 U. S. 32, Mr. Justice Clark referred to the principle that a strong presumptive validity attaches to an Act of Congress.

Cases enunciating and applying this doctrine are legion. The following are a few of them: *Dartmouth College* v. *Woodward*, 4 Wheat. 518, 625; *Legal Tender Cases*, 12 Wall. 457, 531; *Munn* v. *Illinois*, 94 U. S. 113, 123; *United States* v. *Harris*, 106 U. S. 629, 635; *Close* v. *Glenwood Cemetery*, 107 U. S. 466, 475; *Atchison, Topeka & Santa Fe R.R.* v. *Matthews*, 174 U. S. 96, 104; *Middleton* v. *Texas Power & Light Co.*, 249 U. S. 152, 157; *O'Gorman & Young, Inc.* v. *Hartford Fire Ins. Co.*, 282 U. S. 251, 257-258.

The principles that the Supreme Court formulated as a guide primarily for itself in deciding constitutional questions are *a fortiori* binding and controlling on District Courts and Courts of Appeals. From the early years of the Republic and through the first half of the Nineteenth Century, the Supreme Court consistently and rigidly adhered to these doctrines in passing upon the validity of legislative enactments. Thus, between 1790 and 1860 only two Acts of Congress were declared unconstitutional by the Supreme Court.[2] One of them, which was stricken down in *Marbury* v. *Madison*, 1 Cranch. 137, was a provision of the Judicial Code of minor importance relating to the jurisdiction of the Supreme Court.

A shift in the attitude toward the validity of legislative measures began after the Civil War and the subsequent enactment of the Fourteenth Amendment. From time to time legislation in the social and economic field was held invalid as repugnant to the Due Process Clause or the Equal Protection Clause of the Fourteenth Amendment. These provisions were deemed to enact into the Constitution the right of freedom of contract and the privilege of using one's property without governmental interference.

[2] Robert H. Jackson, *The Struggle for Judicial Supremacy*, p. 40.

During the decade beginning in 1920, the number of Acts of Congress declared invalid rose to a high point.[3] Almost invariably these decisions were reached against emphatic protests contained in dissenting opinions of members of the Court who were in the minority, but who have been regarded as enlightened, progressive and far-sighted. Their dissenting opinions form part of the classics of our constitutional history and constitutional law.

In *Lochner* v. *New York*, 198 U. S. 45, in which a statute regulating the hours of labor in a bakery was held invalid as interfering with the freedom of contract, Mr. Justice Holmes wrote a forceful dissenting opinion, which has been often quoted and which is worthy of repetition. He said (p. 75):

> "This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of the majority to embody their opinions in law. It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious or if you like as tyrannical as this, and which equally with this interfere with the liberty to contract. . . . *The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics.*" [Emphasis supplied.]

Mr. Justice Holmes again spoke out emphatically in protest against the decision of the majority in *Hammer* v. *Dagenhart*, 247 U. S. 251, in which the Supreme Court invalidated an Act of Congress prohibiting transportation

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[3] Robert H. Jackson, *Id.* p. 40.

in interstate commerce of goods manufactured in a factory employing child labor. In his dissenting opinion, Mr. Justice Holmes said, in part (p. 280):

> "I had thought that the propriety of the exercise of a power admitted to exist in some cases was for the consideration of Congress alone and that this Court always had disavowed the right to intrude its judgment upon questions of policy or morals. It is not for this Court to pronounce when prohibition is necessary to regulation if it ever may be necessary. . . ."

During that era there were numerous expressions in dissenting opinions of a similar tenor culminating in the celebrated dissenting opinion of Mr. Justice Stone in *United States* v. *Butler*, 297 U. S. 1, in which the Court held the Agricultural Adjustment Act to be unconstitutional. His ringing words deserve frequent reiteration. He said, in part (pp. 78-79, 87):

> "The power of courts to declare a statute unconstitutional is subject to two guiding principles of decision which ought never to be absent from judicial consciousness. One is that *courts are concerned only with the power to enact statutes, not with their wisdom.* The other is that while unconstitutional exercise of power by the executive and legislative branches of the government is subject to judicial restraint, the only check upon our own exercise of power is *our own sense of self-restraint.*"
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> "*Courts are not the only agency of government that must be assumed to have capacity to govern.*" [Emphasis supplied.]

The minority in many of these cases intimated from time to time that the majority were unconsciously influenced by

their own personal predilections in social and economic matters. The situation became of sufficient moment for two Presidents of the United States to register protests in different ways. President Theodore Roosevelt suggested one remedy, and President Franklin D. Roosevelt recommended another.[4] As a matter of coincidence at about the time when the proposal of President Franklin Roosevelt was defeated in Congress, the Supreme Court seemed to reverse its attitude, going as far as overruling some of the prior decisions to which reference has been made, *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379, in which Mr. Chief Justice Hughes wrote the prevailing opinion. A new era in American constitutional history arrived. The tendency of the Supreme Court to annul social welfare legislation, which had prevailed for several decades was drastically ended, and was supplanted by a more progressive trend. It is to be hoped that the pendulum will not swing back and inaugurate another cycle when it may be said that personal social and economic predilections of judges unconsciously influence decisions on constitutionality of legislation, — even though the predilections may be dicerent.

In my opinion the statutory provision challenged in these cases is clearly a valid exercise of legislative power. Relief and welfare payments by the Government are grants. They are not the payment of legal obligations. The legislative branch of the Government in providing grants has a right to select objects for which and the persons to whom they shall be made. That it chooses to make grants to members of one group does not mean that it is under an obligation to make similar grants to members of another group, even though the second group

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[4] For interesting accounts by two active participants in the controversy involved in the proposals of President Franklin D. Roosevelt, see Robert H. Jackson, *The Struggle for Judicial Supremacy*, pp. 177 et seq.; and Burton K. Wheeler, *Yankee from the West*, pp. 319 *et seq.*

may be similar to the first and equally worthy. *A fortiori* the fact that Congress has authorized grants to be made to members of one group, does not empower the courts to extend them to members of the second group.

Even in connection with meeting legal and moral obligations, the Congress may make distinctions between objects and persons. For example, by the Federal Tort Claims Act the Congress waived the sovereign immunity of the United States to suit in tort. It excepted, however, certain specified torts. Surely, it would not be contended that the exceptions are invalid and that, therefore, the immunity should extend to torts in the excepted list. So, too, certain groups of persons, such as Government employees, have been held to be outside of the scope of the Federal Tort Claims Act. Surely, it cannot be contended that these exceptions are likewise invalid and that, therefore, by judicial construction Government employees are entitled to the benefits of the Federal Tort Claims Act.

No basis for invalidity is discernible in a limitation of grants or welfare and relief funds to residents of the State. In fact, the majority opinion so concedes. The legislature, however, is not compelled to leave the matter of determining whether a particular person is or is not a resident to administrative officials. Such a course would be administratively inefficient, ponderous and slow, as well as expensive. No reason is perceived why Congress may not provide a simple formula for distinguishing permanent residents of the State from other persons who happen to be sojourning in it at any one time. Residence for one year is such a test. There are numerous rights and privileges that are conferred on residents of a State but which are denied to other persons within its boundaries. An outstanding example is the residence requirement for voters, imposing a specified length of residence within the State. Certain occupations are at times limited to residents. Numerous examples may be cited.

A somewhat similar question arose in *Flemming* v. *Nestor*, 363 U. S. 603. The Social Security Act contains a provision cutting off old age insurance benefits and disability insurance benefits from any person who has been deported from the United States on any one of specified grounds, 42 U.S.C.§402(n)(1). The validity of this provision was challenged in that case. The Supreme Court upheld the constitutionality of this Section, even though it related to benefits of a contributory insurance scheme to which the insured had made periodic payment, instead of consisting of mere grants, as is the case here. In discussing this question the Supreme Court wrote as follows (p. 611):

> "In judging the permissibility of the cut-off provision of [§402(n)] .... from this standpoint, it is not within our authority to determine whether the Congressional judgment expressed in that section is sound or equitable, or whether it comports well or ill with the purposes of the Act. 'Whether wisdom or unwisdom resides in the scheme of benefits set forth in Title II, it is not for us to say. The answer to such inquiries must come from Congress, not the courts. Our concern here, as often, is with power not with wisdom.' ... Particularly when we deal with a withholding of a noncontractual benefit under a social welfare program such as this, we must recognize that the Due Process Clause can be thought to interpose a bar only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification."

As concerns the Equal Protection of the Laws Clause of the Fourteenth Amendment, it needs no citation of authorities to establish that reasonable classifications are not a violation of that constitutional provision. Admittedly, it is reasonable to differentiate between residents and non-residents for the purpose of making relief pay-

ments. The one-year requirement is a simple method of distinguishing between the two groups. The Legislature does not have to adopt a ponderous system of taking evidence as to each applicant to determine whether the applicant is a *bona fide* resident of the State. As heretofore stated, such a method of administration might well bog down the whole relief system in delays, expenses and frustration. Legislatures may have valid reasons for limiting relief payments to residents of the State for a specific minimum period. Whether we would approve the same course as a matter of policy and expediency is immaterial. The manifest purpose of the legislation is to prevent a particular State or District from becoming a Mecca for migrants from other States where relief payments are smaller. This is a reasonable and legitimate purpose.

A survey of relief payments in some of the neighboring States, as compared with those made in the District of Columbia, clearly demonstrates the reason for the possible fear of the District of Columbia that it might be confronted with an invasion of prospective applicants for relief from other States, if it were not for the residence qualification. For example, during the fiscal year ending June 30, 1967, the average monthly grant of aid to dependent children in the District of Columbia for a family was $168.08; in Virginia, it was $123.59; in Maryland, it was $153.22; in West Virginia, only $98.14; in North Carolina, it was $24.24 per person. The average grant of old age assistance in the District of Columbia was $67.20, as compared with $60.29 in Maryland; $48.16 in West Virginia; and $58.06 in North Carolina. The average monthly grant of aid to disabled was $81.72 in the District of Columbia, as compared with $75.57 in Maryland; $77.82 in Virginia; $45.77 in West Virginia; and $64.36 in North Carolina.

The second infirmity found in the statute by the majority opinion is that the limitation interferes with freedom of travel. The right to travel throughout the realm is concededly one of the privileges and immunities of a citizen of the United States. Clearly the District of Columbia or any one of the States, would be without power to block the entrance of any person residing within the United States, or in any way directly to interfere with travel between the States. The existence of this right does not bar the Congress, however, from imposing a tax on railroad, airline or bus tickets and thereby making travel more costly. It does not constitute an invalid interference with the right of travel from State to State, or from any State to the District of Columbia, to impose residence requirements for voters, or for the pursuit of specified occupations. The same reasoning applies to residence requirements for eligibility to relief payments.

The decision in *Edwards* v. *California,* 314 U. S. 160, 174 is clearly distinguishable. The statute held invalid in that case made it a criminal offense to bring in or assist in bringing in to the State any indigent person who was not a resident of the State. This enactment created a direct interference with the right of travel. The opinion of the Supreme Court pointed out clearly that all that was being determined was the propriety of an attempt by a State to prohibit transportation of indigent non-residents and the question of relief to newcomers was not involved. At page 174, the Court stated:

> " . . . we are not now called upon to determine anything other than the propriety of an attempt by a State to prohibit the transportation of indigent non-residents into its territory. The nature and extent of its obligation to afford relief to newcomers is not here involved."

There is another and very important aspect to the subject under discussion. If the exclusion of persons who

have not resided in the jurisdiction for at least one year is stricken down, the entire relief plan falls. This is not a case where one provision of the statute is so disconnected from the balance that the rest can stand even if the one provision be held invalid. Here the residence requirement is part of the scheme enacted by the Congress. If it is held that the Congress may not provide for welfare payments of one kind or another without including persons who have sojourned in the jurisdiction for less than one year, it does not follow that if the exclusion is annulled payment may be made to those persons whom Congress has expressly excluded. If the Congress passes an Act making grants to members of Group A and the Court holds that Congress may not constitutionally do so without extending the benefits to members of Group B, the result is that the entire scheme becomes invalid. The Courts may not accord the benefits of the Act to members of Group B by practically amending the statute. Congress may well say that if we cannot limit our grants to members of Group A, no grants shall be made at all if we must include members of Group B. In other words, the subject must go back to Congress, and the entire statute dealing with public assistance, D.C.Code § 3:201-223 must be deemed invalid."

Mr. Justice Brandeis in *Dorchy* v. *Kansas*, 264 U. S. 286, 290, a case that has often been cited as authoritative, summarized the governing principle as follows:

> "But a provision, inherently unobjectionable, cannot be deemed separable unless it appears both that, standing alone, legal effect can be given to it and that the legislature intended the provision to stand, in case others included in the act and held bad should fall."

The fact that the statute contains a severability clause is not decisive. It merely shifts the burden of proof from

the plaintiff to the defendant on the question whether the balance of the statute can remain operative if one part is excised as invalid.

In *Hill* v. *Walace*, 259 U. S. 44, 71, the Court stated:

> ". . . undoubtedly such a provision furnishes assurance to courts that they may properly sustain separate sections or provisions of a partly invalid act without hesitation or doubt as to whether they would have been adopted, even if the legislature had been advised of the invalidity of part. *But it does not give the court power to amend the act.*" [Emphasis supplied.]

In this instance if the exclusion of persons who have not resided in the jurisdiction for at least one year, is stricken down with the intention that this group should receive the benefit of the Act, the majority of the Court would be amending the Act and expanding its scope. The exclusion is part of the warp and woof of the statute and not a separable clause.

In *Railroad Retirement Board* v. *Alton Railroad Co.*, 295 U. S. 330, 362, the Court discussed the effect of a severability clause as follows:

> "Such a declaration provides a rule which may aid in determining the legislative intent, but is not an inexorable command. *Dorchy* v. *Kansas*, 264 U.S. 286. It has the effect of reversing the presumption which would otherwise be indulged, of an intent that unless the act operates as an entirety it shall be wholly ineffective. . . . But notwithstanding the presumption in favor of divisibility which arises from the legislative declaration, we cannot rewrite a statute and give it an effect altogether different from that sought by the measure viewed as a whole."

In *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 313, the Court succinctly summarized this doctrine and the effect of the severability clause as follows:

> "The statutory aid to construction in no way alters the rule that in order to hold one part of a statute unconstitutional and uphold another part as separable, they must not be mutually dependent upon one another."

The conclusion is inescapable that if the Court strikes down the provision of the public assistance statute of the District of Columbia limiting the benefits of the Act to needy individuals who have resided in the District of Columbia for at least one year, the entire statute is nullified, because Congress did not legislate to make grants to any one who does not meet the eligibility requirement, and if this qualification is annulled, the entire Act falls. The Court may not by construction extend the provisions of the Act to persons not included in it. The only remedy would be new legislation.

I am not unmindful of the fact that a similar residence requirement in Delaware has been recently held unconstitutional by a three-judge District Court, *Green* v. *Department of Public Welfare,* 270 F. Supp. 173; and likewise that a Connecticut statute that is somewhat akin to that involved here was held unconstitutional in *Thompson* v. *Shapiro,* 270 F. Supp. 331, by a vote of two to one. With due deference and respect for these two courts, the decisions do not seem persuasive. In the Connecticut case Judge Clarie's dissenting opinion is more convincing than the majority view. Moreover, the Connecticut statute is quite different from the customary residence requirement. It excludes from the benefits of the welfare statute any person who comes into the State without visible means for support and applies for aid within one year after arrival. It is not a provision basing eligibility on residence alone.

Neither the Delaware case, nor the Connecticut decision, consider the question of severability and whether striking down the residence requirement would invalidate the entire statutory scheme. Apparently that point did not come to the attention of either Court.

The Social Security Act is a comprehensive, far-reaching, progressive statute of epochal social and economic significance. It was framed on the basis of detailed studies by Committees created by the President. It was thoroughly and carefully considered by the Congress and its Committees. The legislation was the fruit of long and thorough studies and scrutiny on the part of numerous persons. The statute introduced social insurance into the United States on a large scale. Its beneficent contributory plans for compulsory old age insurance and for unemployment insurance accorded permanent economic security and independence to millions of persons who had lived in dread as to what was to become of them in old age or in case of loss of employment for a lengthy period. The public assistance features of the legislation, such as aid to dependent children, which is involved in this legislation, were created as auxiliaries to the insurance schemes. The basic constitutionality of the Act was sustained by the Supreme Court in the leading case of *Helvering* v. *Davis*, 301 U. S. 619. No feature of the statute has been invalidated until the present time.

If the decision of the majority stands, the provisions for aid to dependent children will be thrown into confusion and possibly destroyed. The entire District of Columbia legislation for public assistance likewise becomes a nullity. Such an outcome must be regretted.

ALEXANDER HOLTZOFF
United States District Judge.

October 17, 1967.

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In the Supreme Court of the United States

October Term, 1968
No. [redacted] 34

ROGER A. REYNOLDS, MAYER I. BLUM, HERBERT R. CANN, JR., KATHERINE M. KALLICK, ROSALIE KLEIN, ALFRED J. LAUPHEIMER, EDWARD O'MALLEY, JR., NORMAN SILVERMAN, JULIA L. RUBEL, Constituting the Philadelphia County Board of Assistance, WILLIAM P. SAILER, Its Executive Director, MAX D. ROSENN, Secretary of the Department of Public Welfare of the Commonwealth of Pennsylvania, WILLIAM C. SENNETT, Attorney General of the Commonwealth of Pennsylvania,

Appellants

v.

JUANITA SMITH, Individually, and by Her Minor Children, JOHN SMITH, TABITHA MILLER, SOPHIA PAYNTER, WILLIAM PAYNTER, VONCELL PAYNTER,

Appellees

On Appeal from the United States District Court for the Eastern District of Pennsylvania.

JURISDICTIONAL STATEMENT

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1967
No.

Roger A. Reynolds, Mayer I. Blum, Herbert R. Cain, Jr., Katherine M. Kallick, Rosalie Klein, Alfred J. Laupheimer, Edward O'Malley, Jr., Norman Silverman, Julia L. Rubel, constituting the Philadelphia County Board of Assistance, William P. Sailer, its Executive Director, Max D. Rosenn, Secretary of the Department of Public Welfare of the Commonwealth of Pennsylvania, William C. Sennett, Attorney General of the Commonwealth of Pennsylvania,

Appellants

v.

Juanita Smith, individually, and by her, her minor children, John Smith, Tabitha Miller, Sophia Paynter, William Paynter, Voncell Paynter,

Appellees

On Appeal from the United States District Court for the Eastern District of Pennsylvania

JURISDICTIONAL STATEMENT

The appellants, pursuant to the United States Supreme Court Rules 13(2) and 15, file this their statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction on a direct appeal to review the final decree of permanent injunction in question, and should exercise such jurisdiction in this case.

OPINION BELOW

The Opinion of the United States District Court for the Eastern District of Pennsylvania which is the subject of this appeal is not yet reported. A copy of the Opinion is attached hereto as Appendix A.

JURISDICTION

This action was brought by the appellees (plaintiffs) in the United States District Court for the Eastern District of Pennsylvania, under 28 U.S.C. 1343, 42 U.S.C. 1393, 28 U.S.C. 2281, 2284, and 28 U.S.C. 2201, 2202 to declare Section 432(6) of Act No. 21 of the Pennsylvania Legislature approved June 13, 1967 [1] unlawful and unenforceable as it contravenes the United States Constitution, and to enjoin appellants (defendants) from enforcing said statute against appellees.

Section 432(6) of Act No. 21 of the Pennsylvania Legislature, approved June 13, 1967, has been held constitutional by the District Court for the Middle District of Pennsylvania on January 29th, 1968.

A special three judge court was convened pursuant to 28 U.S.C. 2281, 2284. After hearing an opinion was rendered on December 18, 1967 holding that portion of Section 432(6) relating to durational residence requirement unconstitutional and enjoining appellants from enforcing

---

[1] Act No. 21 of the Pennsylvania Legislature, approved June 13, 1967, known as the "Public Welfare Code" is a codification of welfare provisions in Pennsylvania.

The durational residence requirement contained in Section 432(6) of that Act is the same as that previously contained in the Act of June 24, 1937, P. L. 2051, Section 8.1, as amended by the Act of August 26, 1965.

This case arose under the provision prior to the codification in the Public Welfare Code of 1967, however, reference hereafter will be to the new Section 432(6) in the codification.

that section. Thereafter a notice of appeal was filed with the District Court on January 2, 1968.

The jurisdiction of the Supreme Court to review by direct appeal is conferred by 28 U.S.C. 1253. The following decisions sustain the jurisdiction of this court to review a judgment on direct appeal from a three judge district court:

United States v. Georgia Public Service Commission, 371 U.S. 285;

American Federation of Labor v. Watson, 327 U.S. 582.

STATUTES INVOLVED

The statute of the Commonwealth of Pennsylvania involved is Act No. 21 of the Pennsylvania Legislature, approved June 13, 1967, as follows:

Section 432:

(6) Assistance may be granted only to or in behalf of a person residing in Pennsylvania who:

(i) has resided therein for at least one year immediately preceding the date of application;

(ii) last resided in a state which, by law, regulation or reciprocal agreement with Pennsylvania, grants public assistance to or in behalf of a person who has resided in such state for less than one year.

. . .

QUESTION PRESENTED

A. Whether Section 432(6) of the Pennsylvania Public Welfare Code requiring one year's residence as a condition to eligibility for public assistance violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

Appellees are Juanita Smith, individually, and her minor children John Smith, Tabitha Miller, Sophia Paynter, William Paynter and Voncell Paynter. Appellee Juanita Smith and other plaintiffs from the date of their birth and until December, 1966 resided in the State of Delaware. Since the second week of December 1966, appellees have all resided at 2859 Amber Street, Philadelphia, Pennsylvania.

On February 20, 1967, appellees made application for public assistance and received a grant of $115.00. A second grant in the same amount was received two weeks later on March 10, 1967.

On March 13, 1967, appellee Juanita Smith was informed by the County Board of Assistance that assistance to her and her children would be terminated. This action was taken because appellees did not satisfy the statutory requirement of one year's residence immediately preceding their application.

This suit was filed on March 31, 1967 to declare the Act of June 24, 1937, P. L. 2501, Section 8.1, as amended, and now contained in the Act No. 21 of the Pennsylvania Legislature approved June 13, 1967, Section 432(6), unconstitutional and to preliminarily enjoin defendants from enforcing the said section and to make said injunction permanent after hearing. At the same time appellees moved to convene a three judge District Court under 28 U.S.C. Sections 2281 and 2284 and to allow appellees to proceed in forma pauperis under 20 U.S.C. Section 1915.

On March 31, 1967, the appellees were granted leave to proceed in forma pauperis and their motion for a temporary restraining order was denied.

Hearings were held on May 3, 1967 and May 29, 1967. Appellees' motion that the action be maintained as a class action was granted by District Judge Joseph S. Lord, III, on May 31, 1967.

The court made findings of facts and conclusions of law on June 1, 1967 and issued a preliminary injunction against the defendants as to Juanita Smith and her minor children.

On October 3, 1967, appellees' motion to extend the preliminary injunction to the class was denied.

On December 18, 1967, the court handed down its opinion declaring Section 432(6) of the "Public Welfare Code", Act No. 21 of the Pennsylvania Legislature approved June 13, 1967, unconstitutional as a violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

THE QUESTION PRESENTED IS SUBSTANTIAL

In 1940 a durational residence requirement was held to be constitutional in *People ex rel. Heydenreich v. Lyons,* 347 Ill. 557, 30 N.E. 2d 46. Shortly thereafter the Supreme Court of the United States in *Edwards v. California,* 314 U.S. 164, declined to decide the question; the Court said at p. 174:

> "The nature and extent of its (the State's) obligation to afford relief to newcomers is not here involved".

After these decisions there was a complete absence of adjudication on the issue until the year of 1967. In that year, a number of cases raised the issue of the constitutionality of duration residence requirements for State Public Welfare.

This Court in *Carrington v. Rash,* 380 U.S. 89 and *McLaughlin v. Florida,* 379 U.S. 184 has said that the test to be applied to legislation under the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States is:

> ". . . whether the classifications drawn in a statute are reasonable in light of its purpose".

However, in applying this test, the courts have not reached uniform consensus. Such a durational residence requirement has been held unconstitutional in *Thompson v. Shapiro,* 270 F. Supp. 331 (D. Conn.); prob. juris noted U.S. (1968), which involves the identical issue as presented herein and in which this Honorable Court

has noted jurisdiction. Other cases involving this issue are:

Green v. Department of Public Welfare, 270 F. Supp. 173 (D. Del.);

Harrell v. Tobriner, F. Supp. (D.D.C.).

There not only is a conflict of opinion among the decisions concerning durational residence requirements of different States but also a conflict between the District Courts in Pennsylvania.

Smith v. Reynolds, F. Supp. (E.D. Pa.) in the Eastern District Court for Pennsylvania on December 18, 1967 held Section 432(6) of the Pennsylvania Welfare Code unconstitutional and *Waggoner v. Rosenn*, F. Supp. (M.D. Pa.) in the Middle District Court for Pennsylvania on January 29, 1968 held that Section 432(6) (the section involved here), was constitutional on exactly the same issue. (A copy of that opinion is attached thereto as Appendix C).

The issue involved here is one of national importance since nearly forty (40) States have such durational residence requirements with respect to all or at least some welfare benefits.

CONCLUSION

The history of the adjudication of this question, the existing conflict between the District Courts, and particularly those within Pennsylvania, require a final determination of the matter. Therefore, it is submitted that this Court should review this case and allow presentation of briefs and oral arguments.

Respectfully submitted,

EDGAR R. CASPER
Deputy Attorney General

EDWARD FRIEDMAN
Counsel General

WILLIAM C. SENNETT
Attorney General

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 42419

Juanita Smith, individually, and by her, her minor children, John Smith, Tabitha Miller, Sophia Paynter, William Paynter, Voncell Paynter, on behalf of themselves and all others similarly situated

v.

Roger A. Reynolds, Mayer I. Blum, Herbert R. Cain, Jr., Katherine M. Kallick, Rosalie Klein, Elfred J. Laupheimer, Edward O'Malley, Jr., Norman Silverman, Julia L. Rubel, constituting the Philadelphia County Board of Assistance, William P. Sailer, its Executive Director, Max D. Rosenn, Secretary of the Department of Public Welfare of the Commonwealth of Pennsylvania, William C. Sennett, Attorney General of the Commonwealth of Pennsylvania

OPINION

Before: Harry E. Kalodner, Circuit Judge, and Michael H. Sheridan, and Joseph S. Lord, III, District Judges

By: Joseph S. Lord, III, District Judge

This class action challenges the constitutional validity of a Pennsylvania statutory provision which requires applicants for public welfare to have resided in the State for a period of one year immediately preceding the date of application for assistance. The members of the class are citizens of the United States and bona fide residents of Pennsylvania who would otherwise be qualified for public assistance but for the fact that they have not resided in Pennsylvania for a period of one year. We hold that the residence requirement, as presently administered, constitutes a denial of "equal protection of the laws" to members of the class, and that accordingly, Section 432(6) of the "Public Welfare Code," Act of June 13, 1967, P. L. (Act No. 21)[1] is void and may no longer be enforced.

We are aided in our conclusion by full evidentiary hearings. Plaintiffs' evidence showed that the requirement of one year's residence as a condition to the receipt of public assistance has no logical basis and is wholly arbitrary in its application to needy residents of the Commonwealth. The Attorney General of Pennsylvania, far from disputing this evidence, openly embraced plaintiffs' proofs, adopting the testimony of the expert witnesses who were produced, while introducing no evidence of his own.[2]

---

[1] At the time suit was instituted, the identical provisions were contained in Section 9(a)(2) and 9(d) of the Act of June 24, 1937, as amended, 62 Purdon's Pa. Stat., Section 2508.1(6).

[2] The Deputy Attorney General stated for the record at the conclusion of the second hearing: "If I may say so, Your Honor, the witnesses that Mr. Gilhool [plaintiffs' counsel] called are the very people that I would rely on for my facts. The facts would be exactly the same." N.T. 135.

Thus, the uncontradicted evidence is to the effect that:

(1) The one-year residence requirement does not necessarily prevent migration to the State of impoverished individuals, nor would the abolition of the requirement enhance the attractiveness of the Commonwealth to such persons. Thus, there would be no noticeable increase in the influx of newcomers, poor and otherwise, if the requirement were deleted.

(2) Those persons who do come to Pennsylvania and find themselves in need of public assistance within the first year of their arrival do not, to any significant extent, emigrate to the State for the purpose of obtaining such aid. Although the fact that they may not at present obtain welfare benefits may tend to deter or discourage migration to the State, there is concededly no competent evidence that it does so in fact, nor is there evidence that newcomers, once arrived, depart once they discover their subordinate status. Those who come into the State (and later find themselves in need of public assistance) do so for reasons wholly unrelated to the incidental benefits of public welfare which might be available to them. In most instances, they come to accept or seek employment in the State, to rejoin or join family relations, or for health reasons. Seeking new opportunities or established contacts, they find themselves temporarily in need of public assistance; they apply for such help, and it is denied to them.

(3) The cost to the Commonwealth of providing public assistance to those to whom it is now refused because they have not been residents of the State for at least one year would be an insignificant portion of the present welfare budget—about one-half of one percent—and half of

this amount would be absorbed by the Federal Government.

(4) Administrative costs and budgetary problems would actually be significantly decreased if the residence requirement were abolished; the necessity of screening and investigating applicants in this respect would be eliminated and the savings to the Department of Public Welfare in time and money would be substantial.

(5) The Commonwealth can ascribe no purpose at all to the distinction made by the Statute between residents who have lived in the State for over one year and residents who have not. The Attorney General's position is simply that the Legislature may allocate the State's resources in any way it wishes, and that it may discriminate freely among residents in the matter of public welfare benefits except with respect to the applicant's race, religion, or sex. Any other distinction or classification is permissible, argues the Attorney General, since the Legislature has the uncontrolled discretion to spend its money on whichever of its residents it chooses to favor.

It is elementary constitutional doctrine that the Equal Protection Clause of the Fourteenth Amendment prohibits a State or instrumentalities of the State from invidious discrimination among its citizenry. Reitman v. Mulkey, 387 U.S. 369. There is, of course, no constitutional right to receive public welfare any more than there is a constitutional right to public education or even public police protection. However, if the State chooses to provide such public benefits, privileges, and prerogatives, it cannot arbitrarily exclude a segment of the resident population from their enjoyment. It is for this reason that classifica-

tion in State statutes which purport to exclude from coverage one or more classes of individuals who would otherwise qualify for the advantages and opportunities conferred by the Legislature must be examined in order to determine whether there is any legitimate purpose for the distinction; whether an important and constitutionally cognizable State interest inheres in the classification, or whether on the other hand, the exclusion is purely arbitrary. Loving v. Virginia, 388 U.S. 1 (1967); Carrington v. Rash, 380 U.S. 89, 93 (1965); McLaughlin v. Florida, 379 U.S. 184, 1960 (1964). If the distinction is arbitrary, then the statute deprives the citizens so excluded of equal protection of the State's laws and of the benefits which those laws may impart. A discrimination without rational basis and without legitimate purpose or function is inherently invidious, and hence constitutionally interdicted.

In the context of the present case, we are totally at a loss to discern what purpose, if any, the Pennsylvania Legislature has ascribed to the one year residence requirement. To require a period of one year's residence as a condition to the receipt of public assistance results in the division of Pennsylvania residents into two classes: those who have lived in the State for one year and those who have lived in the State for less than one year. Such a distinction has no apparent purpose. See Green v. Department of Public Welfare, 270 F. Supp. 173 (Del. 1967).[3] The Attorney General does not, of course, contend that its purpose is to erect a barrier against the movement of indigent persons into the State or to effect their prompt

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[3] See also Thompson v. Shapiro, 270 F. Supp. 331 (Conn. 1967) (presently on appeal to the United States Supreme Court); Ramos v. Health & Social Services Bd., F. Supp. (Wis. 1967); Harrell v. Tobriner, F. Supp. (D.C. 1967).

departure after they have gotten there and begun to realize the disadvantage of second-class citizenship. Such a purpose would be patently improper and its implementation plainly impermissible. The right to travel freely without deterrence is inherent in the notion of a unified nation, and no State may exclude citizens migrating from other States, whatever the reason for the migration. Edwards v. California, 314 U.S. 160 (1941); United States v. Guest, 383 U.S. 745 (1966). In any event, the proof mutually accepted by both sides in this case is that deletion of the residence requirement would not result in an influx of destitute relief-seekers.

Nor is there any contention that the residence condition enhances the administrative effectiveness of the Public Assistance Act. To the contrary, all of the evidence is to the effect that many of the burdensome budgetary and administrative problems which are currently encountered by welfare officials in the conduct of the public assistance program would be substantially alleviated by the removal of this bottleneck in the processing of applicants. Moreover, the added cost to the Commonwealth of helping the now excluded class would be relatively insignificant. Needless to say, there would be some increase in cost. It is axiomatic that Pennsylvania does save some money now by excluding residents of less than one year. But the constitutional test of equal protection is not satisfied by considerations of minimal financial expediency alone. To be sure, the State may reduce or even eliminate entirely welfare payments if it chooses to conserve resources in this fashion, it may turn all beggars from its doors. But it may not arbitrarily turn away some who are in need while bestowing its charitable favors on others. There must be some otherwise legitimate purpose for excluding members

of the class who are in fact deprived of the protection and privileges of existing laws. It is not enough to say that the class is excluded because money is saved.

Needy newcomers are no less needy because they are newly arrived. They are no less residents of the State because they have only lately begun to reside there. And they are no less entitled to enjoy the public welfare benefits of which every needy resident of Pennsylvania may partake simply because they have experienced their critical need soon after migrating to their new home.

We do not seek to substitute our judgment for that of the Pennsylvania Legislature. We merely find as an indisputable conclusion of fact, as well as of law, that the Legislature itself has ascribed no proper purpose to the one-year classification. If the classification is without purpose, it is arbitrary per se and offends the Equal Protection Clause.

The Pennsylvania residence requirement constitutes a manifest violation of the Equal Protection Clause; accordingly, the Commonwealth will be enjoined from its further enforcement.

(s) Joseph S. Lord, III

DECREE

And Now, this 18th day of December 1967, it is ordered and decreed that:

(1) Defendants are permanently enjoined from enforcing Section 432(6) of the "Public Welfare Code", Act of June 13, 1967, P. L. (Act No. 21), and from withholding relief benefits from plaintiffs because of the terms of that section;

(2) The enforcement of this injunction is stayed pending prompt application to the Supreme Court for such further stay as that Court deems proper, pending appeal, provided that a notice of appeal is filed within the time and in the manner prescribed by law;

(3) The preliminary injunction entered on June 1, 1967, respecting the named individual plaintiffs and extended to the named intervening plaintiffs on November 14, 1967, is continued in force pending the final disposition of this permanent injunction.

By the Court
Joseph S. Lord, III
J.
Michael H. Sheridan
J.

CONCURRING OPINION

Sheridan, District Judge, concurring.

I concur in holding that the Pennsylvania one-year residence requirement violates the Equal Protection Clause, and must be enjoined from further enforcement. I do not believe that any and all time limitations would be constitutionally interdicted. Rather, I am not convinced that on the present record a rational basis or legitimate purpose can be found in the budget-making function of the Legislature. The record reveals no other basis or purpose which would justify a one-year residence requirement in this kind of legislation.

Michael H. Sheridan

DISSENTING OPINION

Kalodner, Circuit Judge, dissenting

By legislative enactment forty states of the Union and the District of Columbia[1] impose a one-year residence requirement as a condition of eligibility to qualify for public assistance grants to needy families with children.

The Congress of the United States, in enacting legislation providing for federal contributions to such state administered public assistance programs has in specific terms provided that states may establish a one-year residence eligibility requirement.[2]

The majority now holds that the one-year residence requirement imposed by the Pennsylvania statute[3] is unconstitutional under the Equal Protection Clause of the 14th Amendment because in its view it "has no logical basis and is wholly arbitrary in its application to needy residents of the Commonwealth".

In striking down the Pennsylvania statutory provision, the majority has, in sum, substituted its judgment for that of the Pennsylvania legislature, the legislatures of its thirty-nine sister states, and last but not least, the Congress of the United States, which enacted the federal contribution and the District of Columbia statutes.

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[1] District of Columbia Public Assistance Act of 1962, Title 3, Chapter 2, D.C. Code; §3-203, "Eligibility for public assistance", enacted by Congress on October 15, 1962.

[2] Section 602(b), 42 U.S.C.A.

[3] Section 432(6) of the Pennsylvania Public Welfare Code, Act of June 13, 1967.

The majority's action constitutes nothing less than judicial usurpation of the legislative function in presumptuous disregard of the doctrine of separation of powers so firmly established since the founding of our Republic and of the teaching of numerous decisions of the Supreme Court of the United States.

In my opinion, the majority's "fact-finding" that the statutory one-year residence requirement "has no logical basis and is wholly arbitrary", is entirely without evidentiary premise.

I am of the view that this Court should reject the plaintiffs' contention that the Pennsylvania statute is in contravention of the Fourteenth Amendment because the plaintiffs have failed to rebut the presumption of its constitutionality by proof that the statute "does not rest upon any reasonable basis, but is essentially arbitrary." Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 79 (1911).

Discussion of the views stated must be prefaced by a statement of these settled principles to which a federal court must adhere in determining whether a statute contravenes the Fourteenth Amendment:

> ". . . [T]he Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others", and "The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective."[4]
>
> "State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality" and

[4] McGowan v. Maryland, 366 U.S. 420, 425 (1961).

"A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."[5]

"Every presumption is to be indulged in favor of faithful compliance by Congress with the mandates of the fundamental law", and "Courts are reluctant to adjudge any statute in contravention of them."[6]

"One who assails the classification" in a state statute "must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary."[7]

"A statute is not invalid under the Constitution because it might have gone farther than it did. . . ."[8]

". . . 'reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.' "[9]

"Normally, the widest discretion is allowed the legislative judgment in determining whether to attack some, rather than all, of the manifestations of the evil aimed at; and normally that judgment is given the benefit of every conceivable circumstance which might suffice to characterize the classification as reasonable rather than arbitrary and invidious."[10]

Federal courts are not endowed with "authority to determine whether the Congressional [legislative]

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[5] Id. 425, 426.

[6] United States v. Butler, 297 U.S. 1, 67 (1936).

[7] Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78, 79 (1911).

[8] Roschen v. Ward, 279 U.S. 337, 339 (1929).

[9] Morey v. Doud, 354 U.S. 457, 465 (1957).

[10] McLaughlin v. Florida, 379 U.S. 184, 191 (1964).

> judgment . . . is sound or equitable, or whether it comports well or ill with the purposes of the Act", and the "wisdom or unwisdom" of a statute is an irrelevant factor in determining the issue of its constitutionality.[11]

The distilled essence of the stated principles is that legislatures are endowed with a wide range of discretion in enacting laws which affect some of its residents differently from others;[12] "every presumption" of constitutionality must be accorded by courts to a challenged law and the challenger bears the burden of proving that the law is irrational and "essentially arbitrary"; a statutory discrimination will not be declared unconstitutional "if any state of facts reasonably may be conceived to justify it"; the circumstance that a law "might have gone further than it did" in remedying a public social problem does not make it unconstitutional; and the "wisdom or unwisdom", soundness or unsoundness of the legislative judgment are irrelevant considerations in determining the issue of constitutionality.

The majority has not applied the stated principles in holding that the Pennsylvania one-year residence requirement contravenes the Fourteenth Amendment.

Its threshhold errors are (1) failure to take into account the wide range of discretion vested in the Pennsylvania legislature; (2) failure to accord to the challenged statute the presumption of constitutionality; and (3) failure to give effect to the doctrine that a state may enact laws which affect some of its residents differently from

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[11] Flemming v. Nestor, 363 U.S. 603, 611 (1960).

[12] Except in instances where the differences are based on race, color or religion. Loving v. Virginia, 388 U.S. 1 (1967).

others when the difference is not based on racial or religious considerations.

The majority has structured its ruling on these stated conclusions:

> ". . . [W]e are totally at a loss to discern what purpose, if any, the Pennsylvania Legislature has ascribed to the one-year residence requirement";
>
> the ". . . division of Pennsylvania residents into two classes: those who have lived in the State for one year and those who have lived in the State for less than one-year . . . has no apparent purpose";
>
> ". . . many of the burdensome budgetary and administrative problems" of public welfare officials "would be substantially alleviated by the removal of this bottleneck in the processing of applicants";
>
> ". . . the added cost to the Commonwealth of helping the now excluded class would be relatively insignificant".

With respect to these "conclusions" this must be said:

The majority's failure to "discern" the legislative purpose in enacting the one-year residence requirement and its further failure to see any "apparent purpose" into "the division of Pennsylvania residents into two classes", do not afford an affirmative legal basis for its ultimate fact-finding that "Plaintiffs' evidence showed that the requirement of one year's residence as a condition to the receipt of public assistance has no logical basis and is wholly arbitrary in its application to needy residents of the Commonwealth".

Nor do the majority's conclusions that (1) Pennsylvania's "burdensome budgetary and administrative prob-

lems . . . would be substantially alleviated" if the legislature had not enacted the one-year residence requirement, and (2) ". . . the added cost to the Commonwealth of helping the now excluded class would be relatively insignificant", provide a premise for its holding of unconstitutionality. These conclusions are merely "judgment" conclusions which in effect substitute the judgment of a court for the judgment of the legislature. As earlier stated, the "wisdom or unwisdom" of a statute is an irrelevant consideration in determining the issue of unconstitutionality.

Coming now to my view that the challenged Pennsylvania statute must be held constitutional because the plaintiffs have failed to rebut the presumption of its constitutionality by adducing evidence that the statute "does not rest upon any reasonable basis but is essentially arbitrary".

The "evidence" relied on by the majority is not by any stretch of the imagination "evidence" within the meaning of that term. The majority has treated as "evidence" its "loss to discern" any "purpose" in the enactment of the legislation, and its "judgment" conclusion that Pennsylvania's "burdensome budgetary and administrative problems . . . would be substantially alleviated" if the challenged residence requirement had not been enacted. The speculative evidence that the "added cost to the Commonwealth of helping the now excluded class would be relatively insignificant" is irrelevant to the determination of the constitutionality of the legislation.

The following "state of facts reasonably may be conceived to justify" the challenged statutory discrimination:[12]

---

[12] McGowan v. Maryland, 366 U.S. 420, 426.

The Pennsylvania Legislature annually enacts a budget for the following year which must limit the total of its appropriations to its estimated annual tax revenue, inasmuch as Pennsylvania's Constitution limits the Commonwealth's borrowing capacity to $1,000,000.

The Pennsylvania Legislature appropriated $199,800,000 of state revenues for public assistance grants for the fiscal year ending June 30, 1968—a significant percentage of the Commonwealth's annual budget.

The Legislature in its budget-making is required to make such an appropriation for public assistance as can be reasonably and intelligently estimated on the basis of these factors:

1. The estimated yield of state taxes.

2. The number of its residents currently receiving public assistance grants. They include needy families with dependent children, indigent aged and blind, permanently disabled persons between the ages of 18 and 64, and those who need assistance in the payment of bills for in-patient hospital and nursing home care, doctor, dentist, nursing and drug expenses.[14]

3. Increase in cost-of-living expenses of those on public assistance rolls which make necessary increased allotments.

4. Increase in the number of those receiving indigent aged assistance in view of the extended life expectancy experienced in recent years.

---

[14] The skyrocketing increase in hospitalization and medical expense during the past two years alone is evidenced by the fact that the legislative allowance for these items alone leaped from $38,600,000 in the fiscal year ending June 30, 1967 to $61,200,000 for the fiscal year ending June 30, 1968.

It is a conceivable fact that in light of the foregoing factors the Pennsylvania Legislature enacted the one-year residence eligibility requirement to serve *predictive purposes* in making its appropriations for public assistance.

The foregoing establishes that the Pennsylvania one-year residence eligibility requirement "cannot be condemned as so lacking in rational justification as to offend due process". Flemming v. Nestor, 363 U.S. 603 (1960). In that case the Supreme Court explicitly stated, at page 612, that the factor of residence "can be of obvious relevance to the question of eligibility". It did so in ruling constitutional Section 202(n) of the Social Security Act, 42 U.S.C.A. §402(n), which provides for termination of old-age, survivor, and disability insurance benefits payable to, or in certain cases in respect of, an alien individual who is deported under §241(a) of the Immigration and Nationality Act, 8 U.S.C.A. §1251(a), on any one of certain grounds specified in §202(n).

It is pertinent to call attention to the fact that Congress in enacting the Social Security Act provided, in Section 202(t), 42 U.S.C.A. §402(t), for termination of benefits payable under the Act to any alien beneficiary who had resided outside the United States for more than six months.

For the reasons stated, I am of the opinion that the one-year residence eligibility requirement of Section 432(6) of the Pennsylvania Public Welfare Code, Act of June 13, 1967 does not contravene the Fourteenth Amendment.

This must be added. The majority's opinion does not advert to the plaintiffs' alternative claim that the one-year residence eligibility requirement is unconstitutional

because it abridges their right of freedom to travel from one state to another.

In my opinion that alternative claim is so specious and unfounded that it does not merit extended discussion. It is only necessary to say that the Pennsylvania statute does not "prohibit" travel into the Commonwealth as evidenced by the facts that the plaintiffs in the instant case were freely permitted entry. The fact that the one-year eligibility requirement may operate to *affect* a decision to travel into Pennsylvania cannot by any stretch of the imagination be construed as a "statutory" *bar* to travel.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 42419

Juanita Smith, individually, and by her, her minor children, John Smith, Tabitha Miller, Sophia Paynter, William Paynter, Voncell Paynter, on behalf of themselves and all others similarly situated

v.

Roger A. Reynolds, Mayer I. Blum, Herbert R. Cain, Jr., Katherine M. Kallick, Rosalie Klein, Alfred J. Laupheimer, Edward O'Malley, Jr., Norman Silverman, Julia L. Rubel, constituting the Philadelphia County Board of Assistance, William P. Sailer, its Executive Director; Max D. Rosenn, Secretary of the Department of Public Welfare of the Commonwealth of Pennsylvania; William C. Sennett, Attorney General of the Commonwealth of Pennsylvania

FINDINGS OF FACT, DISCUSSION AND CONCLUSIONS OF LAW

Before: Harry E. Kalodner, Circuit Judge, and Michael H. Sheridan and Joseph S. Lord, III, District Judges

By: Joseph S. Lord, III, District Judge

Findings of Fact

1. Plaintiffs are Juanita Smith, individually and, by her, her minor children, John Smith, Tabitha Miller, Sophia Paynter, William Paynter, and Yoncell Paynter.

2. Defendants, with the exception of William C. Sennett, Attorney General of the Commonwealth of Pennsylvania, are variously charged with the powers and duties of administering public assistance, determining the eligibility of all applicants, superintending the public assistance program, and establishing rules, regulations, and standards for administration by County Boards of Assistance.

3. The Act of June 24, 1937, P. L. 2051, §§9(a)(2) and 9(d), as amended, 62 Purd. Stat. §2508.1(6), provides that assistance shall be granted only to or in behalf of a resident of Pennsylvania who has resided therein for at least one year immediately preceding the date of application.

4. Plaintiff Juanita Smith resided in Philadelphia, Pennsylvania until 1959 and attended public schools in Philadelphia. From 1959 to December 1966, plaintiff Juanita Smith and other plaintiffs as they were born resided in the State of Delaware. Since the second week of December 1966, plaintiffs have resided at 2859 Amber Street, Philadelphia, Pennsylvania.

5. Plaintiffs are now and were at the time of the institution of this suit citizens of the United States.

6. Plaintiffs intend to reside permanently in Pennsylvania.

7. On February 20, 1967, plaintiffs made application for public assistance and that day received a grant of $115.00.

8. A second grant in the same amount was received two weeks later on March 10, 1967.

9. On March 13, 1967, plaintiff Juanita Smith was informed by the County Board of Assistance that assistance to her and her children would be terminated.

10. Assistance to plaintiffs was terminated solely because they did not satisfy the statutory requirement of one year's residence immediately preceding their application.

11. No alternative resources, either from public programs or private agencies, exist to provide financial assistance to maintain plaintiffs here.

12. Plaintiffs are faced with a choice of remaining in Pennsylvania with no income to maintain themselves, separating the family by placing the children in foster home care, or returning to Delaware.

13. Plaintiffs are suffering and will suffer immediate, certain, great and irreparable injury from termination of public assistance.

14. If preliminarily enjoined from refusing to continue public assistance to plaintiffs, defendants will suffer negligible injury.

Discussion

Requisite to the granting of a preliminary injunction is a showing that the plaintiff will suffer irreparable injury and a balancing of the "conveniences of the parties

and possible injuries to them according as they may be affected by the granting or withholding of the injunction." Yakus v. United States, 321 U.S. 414, 440 (1944); Joseph Bancroft & Sons Co. v. Shelley Knitting Mills, Inc., 268 F. 2d 569, 574 (C.A. 3, 1959). We have found that plaintiffs will suffer irreparable injury. On the other hand, it is obvious that any injury to the Commonwealth would be *de minimis*. Thus, as to this essential, the balance is heavily in favor of the plaintiffs.

There are on the record here serious and substantial questions[1] of constitutional dimension, *inter alia*, as to whether the one-year residence requirement in the Pennsylvania Act of June 24, 1937 is a reasonable classification.[2]

Conclusions of Law

1. The court has jurisdiction over the parties and the subject matter.

2. Plaintiffs have raised serious and substantial issues concerning the constitutionality of the Pennsylvania Act of June 24, 1937, P. L. 2051, §§9(a)(2) and 9(d), as amended.

3. The record presents serious and substantial questions of constitutional dimension.

4. Plaintiffs will suffer imminent and irreparable harm if preliminary relief is withheld.

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[1] Railroad Yardmasters of America v. Pennsylvania Railroad Company, 224 F. 2d 226, 229 (C.A. 3, 1955).

[2] Carrington v. Rash, 380 U.S. 89, 93 (1965); McLaughlin v. Florida, 379 U.S. 184, 190 (1964).

5. Any injury to defendants as a result of the granting of preliminary relief will be negligible.

6. Plaintiffs are entitled to a preliminary injunction as prayed.

DECREE

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1. And Now, June 1, 1967, defendants are preliminarily enjoined from enforcing sections 9(a)(2) and 9(d) of the Act of June 24, 1937, P. L. 2051, as amended, and from withholding relief benefits from plaintiffs because of the terms of those sections.

2. This preliminary injunction shall not be construed to extend to any person other than the plaintiffs set forth in Finding of Fact No. 1.

By the Court:
Joseph S. Lord, III,
J.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil Action No. 9841

Leila Waggoner, individually and Lenore Marie Waggoner, Anita Diane Waggoner, Susan Elaine Waggoner, Theresa Anne Waggoner, Ronald James Waggoner, Jamie Leah Waggoner, and Sharon Michelle Waggoner, by Leila Waggoner, their mother and next friend, all of Pittsburgh, Pennsylvania, individually and on behalf of all others similarly situated,

Plaintiffs

v.

Max Rosenn, Secretary of Public Welfare of the Commonwealth of Pennsylvania,

Defendant

OPINION

Before: Harry E. Kalodner, Circuit Judge, and Michael H. Sheridan, Chief Judge, and Frederick V. Follmer, District Judge

By: Harry E. Kalodner, Circuit Judge:

In this class action plaintiffs challenge the constitutionality of the one-year residency requirement imposed by Section 432(6) of the Pennsylvania Public Welfare Code, Act of June 13, 1967 P. L. (Act No. 21), as a condition of eligibility for public assistance grants to needy families with children.[1] They urge that the stated residency requirement (1) denies them due process, and equal protection of the laws accorded by the Fifth and Fourteenth Amendments to the Constitution, and (2) abridge their "right to move freely from state to state" in violation of Art. I, Section 8 of the Constitution.

Defendant denies that the residency requirement of the Pennsylvania Public Welfare Code deprives plaintiffs of their constitutional rights as alleged and moves to dismiss the complaint for failure to state a claim upon which relief can be granted, Rule 12(b)(6), Fed. Rules Civ.

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[1] Section 432(6) provides:

"Assistance may be granted only to or in behalf of a person residing in Pennsylvania who (i) has resided therein for at least one year immediately preceding the date of application; (ii) last resided in a state which, by law, regulation or reciprocal agreement with Pennsylvania, grants public assistance to or in behalf of a person who has resided in such state for less than one year; (iii) is a married woman residing with a husband who meets the requirement prescribed in subclause (i) or (ii) of this clause; or (iv) is a child less than one year of age whose parent, or relative with whom he is residing, meets the requirement prescribed in subclause (i), (ii) or (iii) of this clause or resided in Pennsylvania for at least one year immediately preceding the child's birth. Needy persons who do not meet any of the requirements stated in this clause and who are transients or without residence in any state, may be granted assistance in accordance with rules, regulations, and standards established by the department."

Proc., 28 U.S.C.A., or, in the alternative, moves for summary judgment in his favor on the ground that there is no genuine issue as to any material fact. Rule 56. Ibid.

Applicable to our consideration of the issues presented are these settled principles to which a federal court must adhere in determining whether a statute contravenes Constitutional guarantees:

> ". . . [T]he Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others", and "The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective."[2]
>
> "State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality" and "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."[3]
>
> "Every presumption is to be indulged in favor of faithful compliance by Congress with the mandates of the fundamental law", and "Courts are reluctant to adjudge any statute in contravention of them."[4]
>
> "One who assails the classification" in a state statute "must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary."[5]

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[2] McGowan v. Maryland, 366 U.S. 420, 425 (1961).

[3] Id. 425-426.

[4] United States v. Butler, 297 U.S. 1, 67 (1936).

[5] Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78, 79 (1911).

"A statute is not invalid under the Constitution because it might have gone farther than it did. . . ."[6]

". . . 'reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.'"[7]

"Normally, the widest discretion is allowed the legislative judgment in determining whether to attack some, rather than all, of the manifestations of the evil aimed at; and normally that judgment is given the benefit of every conceivable circumstance which might suffice to characterize the classification as reasonable rather than arbitrary and invidious."[8]

Federal courts are not endowed with "authority to determine whether the Congressional [legislative] judgment . . . is sound or equitable, or whether it comports well or ill with the purposes of the Act", and the "wisdom or unwisdom" of a statute is an irrelevant factor in determining the issue of its constitutionality.[9]

The distilled essence of the stated principles is that legislatures are endowed with a wide range of discretion in enacting laws which affect some of its residents differently from others;[10] "every presumption" of constitutionality must be accorded by courts to a challenged law and the challenger bears the burden of proving that the law is irrational and "essentially arbitrary"; a statutory

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[6] Roschen v. Ward. 279 U.S. 337, 339 (1929).
[7] Morey v. Doud, 354 U.S. 457, 465 (1957).
[8] McLaughlin v. Florida, 379 U.S. 184, 191 (1964).
[9] Flemming v. Nestor, 363 U.S. 603, 611 (1960).
[10] Except in instances where the differences are based on race, color or religion. Loving v. Virginia, 388 U.S. 1 (1967).

discrimination will not be declared unconstitutional "if any state of facts reasonably may be conceived to justify it"; the circumstance that a law "might have gone farther than it did" in remedying a public social problem does not make it unconstitutional; and the "wisdom or unwisdom", soundness or unsoundness of the legislative judgment are irrelevant considerations in determining the issue of constitutionality.

Applying the principles stated to the instant situation, we are of the opinion that the plaintiffs have failed to rebut the presumption of constitutionality of the challenged Pennsylvania statute by a "showing" (1) that "it does not rest upon any reasonable basis, but is essentially arbitrary", Lindsley v. Natural Carbonic Gas Co., 320 U.S. 61, 79 (1911); and (2) that the Pennsylvania Legislature transgressed its permissible "wide scope of discretion" in enacting laws which affect some groups of citizens differently than others", McGowan v. Maryland, 366 U.S. 420, 425 (1961).

The following "state of facts reasonably may be conceived to justify"[11] the challenged statutory discrimination.

The Pennsylvania Legislature annually enacts a budget for the following year which must limit the total of its appropriations to its estimated annual tax revenue, inasmuch as Pennsylvania's Constitution limits the Commonwealth's borrowing capacity to $1,000,000.

The Pennsylvania Legislature in its annual budget-making is required to make such an appropriation for public assistance as can be reasonably and intelligently estimated on the basis of these factors:

[11] McGowan v. Maryland, 366 U.S. 420, 426 (1961).

1. The estimated yield of state taxes which are the sole source of Pennsylvania's public assistance funds. The Pennsylvania Legislature appropriated $199,800,000 of state revenues for public assistance grants for the fiscal year ending June 30, 1968—a significant percentage of the Commonwealth's annual budget.

2. The number of its residents currently receiving public assistance grants. They include needy families with dependent children, indigent aged and blind, permanently disabled persons between the ages of 18 and 64, and those who need assistance in the payment of bills for in-patient hospital and nursing home care, doctor, dentist, nursing and drug expenses.[12]

3. Increase in cost-of-living expenses of those on public assistance rolls which make necessary increased allotments.

4. Increase in the number of those receiving indigent aged assistance in view of the extended life expectancy experienced in recent years.

It is a conceivable fact that in light of the foregoing factors the Pennsylvania Legislature enacted the one-year residence eligibility requirement to serve *predictive purposes* in making its appropriations for public assistance.

The foregoing establishes that the Pennsylvania one-year residence eligibility requirement "cannot be condemned as so lacking in rational justification as to offend

[12] The skyrocketing increase in hospitalization and medical expense during the past two years alone is evidenced by the fact that the legislative allowance for these items alone leaped from $38,600,000 in the fiscal year ending June 30, 1967 to $61,200,000 for the fiscal year ending June 30, 1968.

due process". Fleming v. Nestor, 363 U.S. 603, 612 (1960). In that case the Supreme Court explicitly stated, at page 612, that the factor of residence "can be of obvious relevance to the question of eligibility". It did so in ruling constitutional Section 202(n) of the Social Security Act, 42 U.S.C.A. §402(n), which provides for termination of old-age, survivor, and disability insurance benefits payable to, or in certain cases in respect of, an alien individual who is deported under §241(a) of the Immigration and Nationality Act, 8 U.S.C.A. §1251(a), on any one of certain grounds specified in §202(n).

It is pertinent to call attention to the fact that Congress in enacting the Social Security Act provided, in Section 202(t), 42 U.S.C.A. §402(t), for termination of benefits payable under the Act to any alien beneficiary who had resided outside the United States for more than six months.

Of greater moment here is the fact that Congress, in enacting legislation providing for federal contributions to state-administered public assistance programs, provided that states may establish a one-year residence eligibility requirement.[13] Thirty-nine states of the Union have enacted a one-year residence requirement as a condition of eligibility to qualify for public assistance grants to needy families with children, similar to the Pennsylvania provision, and Congress has done so in the District of Columbia Public Assistance Act of 1962.[14]

The one-year residence requirement in the Connecticut, Delaware, Pennsylvania and District of Columbia acts has been ruled unconstitutional by three-judge District

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[13] Section 602(b), 42 U.S.C.A.

[14] Title 3, Chapter 2, D.C. Code, §3-203(a)(b) (1967), "Eligibility for public assistance", enacted October 15, 1962.

Courts in 1967: Thompson v. Shapiro, 270 F. Supp. 331 (D. Conn.); Green v. Department of Public Welfare, 270 F. Supp. 173 (D. Del.); Smith v. Reynolds, F. Supp. (E.D. Pa.); Harrell v. Tobriner, F. Supp. (D.D.C.). The court was unanimous only in Green; dissenting opinions were filed in the other cases cited. It may be noted that the writer of this opinion dissented in Smith v. Reynolds, and that Chief Judge Sheridan, who is here dissenting, was a member of the majority in that case.[15]

We have taken into consideration the contrary views expressed in the foregoing cases. We can only say that the courts therein have substituted their judgment for that of the legislatures of forty states and the Congress of the United States as expressed in the enactment of the District of Columbia Public Assistance Act and Section 602(b), 42 U.S.C.A. of the Social Security Act, which, in providing for federal contributions to state-administered public assistance programs specified that states may establish a one-year residence eligibility requirement. We can only say that we regard the substitution of judicial judgment for that of legislative judgment as nothing less than judicial usurpation of the legislative function in disregard of the doctrine of separation of powers so firmly established since the founding of our Republic, and of the teaching of numerous decisions of the Supreme Court.

There remains this, too, to be said, with respect to the plaintiffs' asserted claim that the one-year residence eligibility requirement is unconstitutional because it abridges their right of freedom to travel from one state to another

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[15] The Supreme Court of the United States on January 15, 1968 granted review in Thompson v. Shapiro, 270 F. Supp. 331 (D. Conn. 1967), sub. nom. Shapiro v. Thompson.

in contravention of the interstate commerce clause of the Constitution, Article I, Section 8.

In our opinion this claim is so specious and unfounded that it does not merit extended discussion. It is only necessary to say that the Pennsylvania statute does not prohibit travel into the Commonwealth, as evidenced by the fact that the plaintiffs in the instant case were freely permitted entry. The fact that the one-year eligibility requirement may operate to affect *a decision to travel* into Pennsylvania cannot by any stretch of the imagination be construed as a "statutory" bar to travel.

For the reasons stated we hold that the one-year residence requirement as a condition of eligibility for public assistance grants to needy families, provided by Section 432(6) of the Pennsylvania Public Welfare Code, Act of June 13, 1967, is constitutional. The plaintiffs' complaint will be dismissed for failure to state a claim upon which relief can be granted.

Sheridan, Chief Judge, dissents.

Harry E. Kalodner,
Circuit Judge.

ORDER.

And Now, to wit, this 29 day of January, 1968, it is ordered that plaintiff's complaint, in the above entitled matter, be and the same is hereby dismissed.

And it is so ordered.

Harry E. Kalodner,
Circuit Judge.
Frederick V. Follmer,
District Judge.

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 9

BERNARD SHAPIRO, Welfare Commissioner of Connecticut,
Appellant,

vs.

VIVIAN THOMPSON,
Appellee.

On Appeal from the United States District Court for the District of Connecticut

Brief of the State of California as Amicus Curiae on Behalf of Appellant

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 813

BERNARD SHAPIRO, Welfare Commissioner of Connecticut,
Appellant,

vs.

VIVIAN THOMPSON,
Appellee.

On Appeal from the United States District Court for the District of Connecticut

Brief of the State of California as Amicus Curiae on Behalf of Appellant

INTEREST OF THE STATE OF CALIFORNIA

The constitutionality of California's durational residence requirement as a condition of eligibility for benefits under the Aid to Families with Dependent Children program has been challenged on the identical grounds as in the instant proceeding.[1]

1. Violation of the Privilege and Immunities Clause and the Equal Protection of the Laws Clause of the Fourteenth Amendment to the United States Constitution. Appellee herein also alleged violation of Art. IV, sec. 2 of the U.S. Const. In the California case the Plaintiffs have alleged violation of the Commerce Clause. (Art. I, sec. 8, cl. 3 of the U.S. Const.)

In course of litigation in the United States District Court for the Northern District of California is *Marshall v. California Department of Social Welfare, et al.*, Civil Action No. 47401 where a three-judge court has been convened.[2]

The State of California fully supports the position of the State of Connecticut asserting the right of a state to impose a residence requirement as a condition for the receipt of public assistance. However, we believe the Court should be apprised of certain important differences between the challenged statutes of the two states.

The Court below found invidious the classifications in the State of Connecticut's statute which grants welfare after three months residency in Connecticut to those who arrived with resources or ready employment but requires one year residency for those who come empty handed. It is imperative to note that California laws contain no such infirmities. Of utmost concern to the State of California and no doubt to all of the states is the Court's apparent conclusion that a statute which has for its purpose protection of the state's fiscal responsibility is per se an unconstitutional purpose. There is also involved the difference between the right to travel freely and a claimed right to be subsidized at the point of stoppage after exercise of the right to travel. We comment on this below.

This argument will be confined to the California statutory plan for Aid to Families with Dependent Children (hereinafter referred to as AFDC) in relation to the decision of the court below.

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2. Defendants filed a Motion for Summary Judgment on October 4, 1967, based essentially on the arguments set forth in this brief, hearing set for January 26, 1968.

CALIFORNIA STATUTES INVOLVED

Welfare & Institutions Code, section 11252 provides:

"No child is eligible to receive aid unless he has residence in the state.

"For the purposes of this chapter, a child who meets any of the following qualifications has residence in the state:

(a) If he has been physically present in the state for one year immediately preceding the date of application.

(b) If his parent or parents have resided in the state for the period of one year immediately preceding the date of application.

(c) If the parent or other relative with whom the child is living has resided in the state for the period of one year immediately preceding the birth of the child and the child was born within one year immediately preceding the date of application.

(d) If he is born in the state."

Welfare & Institutions Code, section 10000 provides:

"The purpose of this division is to provide for protection, care, and assistance to the people of the state in need thereof, and to promote the welfare and happiness of all of the people of the state by providing appropriate aid and services to all of its needy and distressed. It is the legislative intent that aid shall be administered and services provided promptly and humanely, with due regard for the preservation of family life, and without discrimination on account of race, national origin or ancestry, religion, or political affiliation; and that aid shall be so administered and services so provided as to encourage self-respect, self-reliance, and the desire to be a good citizen, useful to society."

Welfare & Institutions Code, section 10001 provides in part:

"The purposes of the public social services for which state grants-in-aid are made to counties are:

(a) To provide on behalf of the general public, *and within the limits of public resources,* reasonable support and maintenance for needy and dependent families and persons. . . ." (Emphasis added)

Welfare & Institutions Code, section 11004 provides in part:

"The provisions of this code relative to public social services for which state grant-in-aid are made to the counties shall be administered fairly to the end that all persons *who are eligible* and apply for such public social services shall receive the assistance to which they are entitled promptly, *with due consideration for the needs of applicants and the safeguarding of public funds* . . . ." (Emphasis added)

ARGUMENT

I. Requiring of All Applicants for AFDC Benefits One Year's Residence in California Has a Reasonable Relationship to the Legislative Purpose of Giving Aid to All Eligible Needy Within the Limits of Available Public Resources and Within Budgetary Predictability and Thus Is Not a Denial of "Equal Protection of the Laws"

The test for ascertaining whether legislation meets the requirements of the equal protection clause of the Fourteenth Amendment to the United States Constitution is "whether the classifications drawn in a statute are reasonable in light of its purpose" *(Carrington v. Rash,* 380 U.S. 89, 93 (1965), quoting *McLaughlin v. Florida,* 379 U.S. 184, 191 (1964).)

Applying this test, the court below held the purpose of Connecticut's durational residence requirement[3] "to pro-

3. Conn. Gen. Stat. § 17-2d provides:
"When any person comes into this state without visible means of support for the immediate future and applies for Aid to Dependent Children under Chapter 301 or general assistance under Part I of Chapter 308 within one year from his arrival,

tect its fisc by discouraging entry of those who come needing relief" void,[4] and that, even if the purpose were valid, the classification based on wealth between those who enter with a cash stake and those who do not is not reasonable in the light of its purpose.[5]

California's statute does not make any distinction between those entrants who are indigent, those with a cash stake, or those with substantial employment prospects. In order to be eligible for AFDC in California every applicant, regardless of race, creed or substance must have one year's residence.

California has a thoroughly reasonable and constitutional basis for its durational residence requirement, it is not as is Connecticuts' to prevent in-migration of indigents. The avowed goal of California's Public Assistance Programs, namely to render assistance to needy and distressed residents of California (Welf. & Inst. Code sec. 10000), must be read with the legislative caveat "to provide on behalf of the general public, and within the limits of public resources, reasonable support and maintenance for needy and dependent family and persons." Welf. & Inst. Code, Sec. 10001(a). Section 11004 of that code provides for the receipt of assistance by all who are eligible "with due consideration for the needs of applicants and the safeguarding of public funds."

The burgeoning population of the State of California has created unprecedented and unpredictable demands on the public resources. Despite the budgeting for the fiscal year 1967-1968 of over $406,000,000 for the Public Assistance

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such person shall be eligible only for temporary aid or care until arrangements are made for his return, provided ineligibility for Aid to Dependent Children shall not continue beyond the maximum federal residence requirement."

4. Jurisdictional Statement, Appendix A, pp. 19, 21.

5. *Id.* p. 21.

Programs, not including health services,[6] the benefit levels of the programs are still below the minimum standards of health and decency.

There is no basis for attributing to the California Legislature an intent to exclude indigent persons from migrating to California or to discriminate unconstitutionally against new residents solely because it has a residence requirement. There is, on the contrary, a real and legitimate purpose, made explicit by the California Legislature, to plan and budget, on a yearly basis, in order to maintain and, if possible, to advance existing benefit levels. Such planning must be made within the limits of a more predictable number of recipients capable of being forecast on the basis of reliable statistics. It is the only realistic way to allocate that scarce resource, public funds. To responsible citizens this is clearly a matter of compelling state interest.

Edwards v. California, 314 U.S. 160 (1941) did not hold that the husbanding of public funds by a state was an unconstitutional objective. (*id.* p. 173) *Edwards* held that the means used by California, i.e., a state statute making it a *crime* to bring an indigent person into the state, thereby preventing or obstructing impoverished United States citizens free ingress into the state, was unconstitutional. The Court stated "Its [the statute's] express purpose and inevitable effect is to prohibit the transportation of indigent persons across the California border." (*id* p. 174) This is neither the express purpose nor the inevitable effect of California Welfare & Institutions Code section 11252.

In *Flemming v. Nestor*, 363 U.S. 603, 611 (1960) this Court in sustaining a cut-off provision of the Social Security Act observed,

> "It is not within our authority to determine whether the Congressional judgment expressed in that section

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6. 1967 Budget Act, sec. 32.5.

> is sound or equitable, or whether it comports well or ill with the purpose of the act . . . when we deal with a withholding of a non-contractual benefit under a social welfare program such as this, we must recognize that the due process clause can be thought to interpose a bar only if the statute manifests a patently arbitrary classification utterly lacking in rational justification."

The California durational residence requirement, concerning a non-contractual benefit clearly has a rational justification. A necessary part of the legislative function is to set limits to a program, define eligibility and draw boundaries. Certainly every welfare plan classifies in just such a manner. But

> "One who assails the classification in such a law has the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary. *Lindsley v. Nat. Carbonic Gas*, 220 U.S. 61, 78-79 (1911)"

Of course durational residence requirements occasionally result in some hardships. This fact is always a consequence of drawing a line.

But

> "A classification having some reasonable basis does not offend against [the Equal Protection] clause merely because it is not made with mathematical nicety or because in practice it results in some inequality." (Ibid.)

That hardships occasionally may result from durational residence requirements does not make the requirements unconstitutional but is only relevant to the legislative wisdom in retaining them. As pointed out in *Ferguson v. Skrupa*, 372 U.S. 726, 729-730 (1963) it is the classic function of the legislature to decide on the wisdom of legislation. This Court declared that "Courts should not extend even express

prohibitions of the constitution beyond their obvious meaning by reading into them conceptions of public policy that the particular court may entertain". Particularly relevant is the further statement "We have returned to the original constitutional proposition that courts do not substitute their social and economical beliefs for the judgment of legislative bodies who are elected to pass laws". (*id.* p. 730) The appellee herein and the plaintiffs in the similar California case are quite clearly asking the courts to supplant what is purely a legislative determination with social opinions which they believe to be more enlightened.

This Court has not been unmindful of the burdens on state finances. In *Madden v. Commonwealth of Ky.*, 309 U.S. 83, 93 (1939) the Court held:

> "An interpretation of the privilege and immunity clause which restricts the power of the states to manage their own fiscal affairs is a matter of gravest concern to them. It is only the emphatic requirements of the constitution which properly may lead the federal courts to such a conclusion."

There is no requirement in the Constitution that mandates a state to afford relief to all or any of its needy residents regardless of the period of their residence. That this succor is socially desirable few would deny. That California has an obligation to supply unpolluted air and water, adequate schools, highways, hospitals, protective services to all of its citizens none would deny. But it does not follow that the non-discriminatory residence requirements of California law amount to an unreasonable classification within the meaning of the Equal Protection Clause.

II. The Constitutionally Protected Right of Interstate Travel and Settlement in the State of One's Choice Does Not Encompass Subsidized Travel or Settlement

It is contended that durational residence requirements infringe on the right to travel freely from state to state. The court below held that Connecticut's residence requirement unconstitutionally abridged that right because it has a "chilling effect" on the right to travel.[7]

California's statute has not been such an impediment as to prevent in-migration to California of 1,122,204 persons during the period 1955-1960.[8] California's population has increased by about 25 percent since the 1960 census.[9]

The court below correctly points out that the "right to travel" cases[10] decided prior to *U.S. v. Guest*, 383 U.S. 745 (1965) have been concerned with absolute proscriptions on movement."[11] But *Guest* does not, as the court below held, proscribe such fancied "chilling effects" on the constitutionally protected right to travel as to prohibit a state's denial of instant free room and board when the right to travel and take up residence in Connecticut or California has been fully exercised. This is particularly true when a state retains its durational residence requirement in order to budget its limited resources for equitable distribution among the myriad rightful demands of its citizens.

The charged conspiracy in *U.S. v. Guest*, 383 U.S. 745, 760 and the statute considered in *Edwards v. California*, 314 U.S. 160 (1941) intentionally and purposely discouraged

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7. Jurisdictional Statement, Appendix A, 19.

8. U.S. Bureau of the Census PC(2)-2B Mobility for States and State Economic Areas.

9. *Silver et al. v. Reagan, et al.*, 67 Adv. Cal. Rpts. 455, 460.

10. *Zemel v. Rusk*, 381 U.S. 1 (1965); *Aptheker v. Secretary of State*, 378 U.S. 500 (1964); *Kent v. Dulles*, 357 U.S. 116 (1958).

11. Jurisdictional Statement, Appendix A, 18.

interstate travel in the first instance of negro citizens and in the second the indigent. These cases are inapplicable to California's residence requirements.

Similarly the State of South Carolina's application of its Unemployment Compensation Act in *Sherbert v. Verner*, 374 U.S. 398-410 (1962) was held "to constrain a worker to abandon his religious convictions respecting the day of rest," and constituted a permanent infringement of a First Amendment freedom. California's durational residence requirement for AFDC eligibility does not constitute a proscription on movement or the exercise of any other constitutionally protected right. There is no conspiracy to "impede" anyone from entering and residing in California. There is no predominant or even subordinate intent to "oppress" anyone from exercising his right of interstate travel.

California's statutory plan for administration of its AFDC program, including its durational residence requirement, does not explicitly or implicitly have for its purpose discouragement of interstate travel by indigents. There is a complete lack of any authority or evidence for the conclusion that durational residence requirements have a "chilling effect" on the constitutionally protected right to free travel between the state and the concomitant right to establish residence where one pleases.[12]

The appellee Vivian Thompson and the plaintiffs in similar cases now in course of litigation in several states were not discouraged by durational residence requirements from entering and taking up residence in the states involved. These litigants are endeavoring to exact a money grant from the state in order to exercise their right to establish

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12. The chilling effect on the exercise of First Amendment rights by the Louisiana penal statutes scrutinized by the Court in *Dombroski v. Pfister*, 380 U.S. 479, 487 (1964), was grounded on the actual prosecutions initiated and threatened under those statutes.

residence where they please. None of the cases relied upon by the court below directly or indirectly hold that there is a constitutional right to be subsidized by the state of one's chosen residence.

Professor Harvith's assertion that "clearly, residence tests affect interstate movement"[13] is pure speculation. It is reached in one leap from the statement that this is so "if the potential migrant recognizes his situation and reacts sensibly."[14] No study is cited to sustain the thesis that durational residence requirements in fact constitute a significant deterrent to migration.

The statute involved in *Edwards v. California,* 314 U.S. 160 (1941), imposing criminal sanctions on those who transported indigent persons into California, did prevent and was enacted to prevent non-resident indigents from coming into the state. It constituted an actual limit on the right to travel freely between the states. *Edwards* did not hold that the state had an obligation to support immediately or at all, everyone entering the state who decided to stay. It was the attempt to prohibit directly the transportation of indigent non-residents into the state that was condemned by the *Edwards* court in holding the statute violated the commerce clause[15] (majority opinion) and the rights of national citizenship (concurring opinions).

We agree that every citizen of the United States has the right to travel freely from state to state (with certain exceptions not herein relevant). We disagree that there is a

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13. Harvith, The Constitutionality of Residence Tests for General and Categorical Assistance Programs, 54 Calif. L. Rev. 567, 580 (1966).

14. *Id.* p. 579.

15. The commerce clause (U.S. Const. art. I, section 8, cl. 3) is clearly inapplicable in view of the Congressional permission of a public assistance residence requirement up to one year (49 Stat. 627 (1935), as amended, 42 U.S.C. § 602(b)(2) (1964)).

constitutionally guaranteed right to be subsidized by either the state from which one wishes to depart or the state to which one wishes to migrate. It is absurd to so distort Mr. Justice Douglas' reference to free ingress and egress and the right to free movement in *Edwards v. California,* 314 U.S. at p. 181. Mr. Justice Douglas has firmly repudiated this notion by stating, "The fact that the government cannot exact from me a surrender of one iota of my religious scruples does not, of course, mean that I can demand of government a sum of money, the better to exercise them. For the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government." *Sherbert v. Verner,* 374 U.S. 398, 412 (1963) concurring opinion.[16]

CONCLUSION

It is submitted that for the foregoing reasons the constitutional questions presented by this appeal are substantial.

Dated: November 29, 1967

Respectfully submitted,

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16. In *Sweeney v. State Board of Public Assistance,* (D.C.P.A.) 36 F. Supp. 171, 174, affirmed 3 Cir. 119 F.2d 1023, cert. den. 314 U.S. 611, (the same term as *Edwards*) the court similarly disposed of a like argument.

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In the

Supreme Court of the United States

OCTOBER TERM, 1967

No. [redacted] 9

BERNARD SHAPIRO, Welfare Commissioner of Connecticut

Appellant

v.

VIVIAN THOMPSON

Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF OF THE APPELLANT

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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 813

BERNARD SHAPIRO, Welfare Commissioner,
State of Connecticut,

Appellant

v.

VIVIAN THOMPSON,

Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF OF THE APPELLANT

OPINION BELOW

The opinion of the Three Judge Court of the United States District Court for the District of Connecticut (A, 4a) announced on June 19, 1967 may be found in 270 F. Supp. 331.

Jurisdiction

The judgment of the Three Judge Court in favor of the appellee was entered June 30, 1967 (A, 4a) a copy of which is printed in the Appellant's Appendix (R, 36a). The respondent docketed the appeal in the Supreme Court of the United States on November 13, 1967. Jurisdiction of this Court is invoked under Title 28 of the United States Code Section 1253 which provides for direct appeals from decisions of Three Judge Courts.

Question Presented

The question presented which was resolved by the Three Judge District Court is:

1. Does Section 17-2d of the 1965 Supplement to the Connecticut General Statutes violate the Fourteenth Amendment, Section 1 to the United States Constitution.

Statutes, Regulations and Policy Involved

Section 17-2d of the 1965 Supplement to the Connecticut General Statutes is the Statute involved and this Statute, the regulations promulgated therefrom and the policy written to carry out the Statute are set forth in Appendix A, B & C respectively which are attached hereto. [B, 19, 20, and 22]

Statement of Facts

The plaintiff, a 19 year old unwed mother of a minor child, moved from Massachusetts, where she had been receiving Aid to Dependent Children from the City of Boston, to Hartford, Connecticut on about June 20, 1966. The plaintiff who was pregnant and later gave birth to another child lived with her mother for a while in Hartford.

Because of her mother's inability to support her, the plaintiff applied for Aid to Dependent Children from the City of Hartford. Here she was told that because of 17-2d of the Connecticut Statutes she was only eligible for temporary aid.

On October 3, 1966 the plaintiff applied for Aid to Dependent Children from the Connecticut Welfare Department of which the defendant is Commissioner. Her application was denied on November 1, 1966 solely because of residency requirements. The plaintiff took a Fair Hearing appeal from this refusal and the Fair Hearing Officer upheld the refusal on the basis of 17-2d.

Catholic Family Services has supported the plaintiff from January 25, 1967 to June 20, 1967 when she became eligible for Aid to Dependent Children.

Connecticut has no residency requirements for any public assistance program except Aid to Dependent Children and under Aid to Dependent Children Connecticut pays 54% of the cost with the Federal Government paying 46%. The average cost per individual case on Aid to Dependent Children in Connecticut is $48.40 per month.

Under the Connecticut regulations to 17-2d a person with a bona fide job offer coming to the state is eligible for Aid to Dependent Children and if they are ready, willing and able to work but have no bona fide job offer, they are eligible for Aid to Dependent Children if they sign up for training under the Title V program or other state job training programs.

Connecticut's yearly per person case load on Aid to Dependent Children has increased from 26,076 in 1960 to 48,485 in 1966.

Argument

I.

DOES SECTION 17-2d OF THE CONNECTICUT GENERAL STATUTES, PARTICULARLY AS IT IS INTERPRETED BY THE REGULATIONS AND POLICY, VIOLATE THE EQUAL PROTECTION AND PRIVILEGES AND IMMUNITY CLAUSES OF THE FOURTEENTH AMENDMENT?

A. Does Connecticut in Fact Discriminate Against New Residents on a Poverty Basis?

The appellee's real contention, which is supported by the majority opinion [A, 26a], is that the appellant as Welfare Commissioner for the State of Connecticut, discriminates

against new residents who are applicants for Aid to Dependent Children solely on a poverty basis.

The appellant concedes that Connecticut may discriminate against potential applicants, who come into the state, where the substantial factor of their entering is to get on the welfare rolls, and who would not come into the state if there were no liberal welfare benefits; but the appellant will argue later that this is a reasonable and valid discrimination. The appellant denies that there is any discrimination on a poverty basis, and, in fact, claims that any elderly poor, mentally or physically disabled poor, or person who was ready to work, or even expresses a desire to work, is eligible for benefits on entering the State of Connecticut on the same basis as a long time resident. Connecticut has no residency requirement for any public assistance program except Aid to Dependent Children [Stipulation of Facts No. 52, A, 44a]. The reason for this is that normally the elderly poor and the mentally or physically disabled come into the state because they previously lived here or to be near close relatives.

To see whether Connecticut discriminates against potential applicants for Aid to Dependent Children the Court must read Section 17-2d of the 1965 Supplement to the General Statutes, [B, 19]; the regulations promulgated under this statute, [B, 20]; and the pertinent policy written to carry out the intention of the statute, [B, 22].

Any person or family who arrives in Connecticut with a specific job offer or an ability to support themselves for three months is entitled to Aid to Dependent Children. [Section 17-2d-1 (b) and (c); Connecticut State Welfare Public Assistance Manual, Volume I, Chapter 2, Section 219.1 a, revised July 18, 1966].

A person who has a desire to work and is at all trainable is immediately eligible for welfare. If he makes a bona fide

effort to get a job he can have the assistance which all Aid to Dependent Children applicants get up to sixty days. If he enrolls in a Connecticut work training program or a training project under Title V, assistance is continued until the course is completed with the applicant obtaining regular employment, even if this time extends through the whole one-year residency period. [B, 24].

In view of the above it would seem that the field of alleged discrimination is narrowed to the person who comes to Connecticut mainly for welfare benefits under Aid to Dependent Children. Even here there is no permanent denial of welfare. If the person can get aid from their own family or aid from some charitable group for a one-year period, that person is eligible for welfare just as the appellee in this case became eligible for welfare before judgment was entered.

Actually then the real claim of the appellee is that Connecticut discriminates against a poor applicant who has no desire to enter the labor market; and the fundamental question facing the Court is whether this discrimination is a reasonable exercise of police power or whether it violates the equal protection and privileges and immunities clause of the Fourteenth Amendment.

Parenthetically it should be noted that the appellee's claim of unavailability to work because of the age of her children, while an argument, failed to satisfy the appellant because there are many mothers in Connecticut and elsewhere in this country that are gainfully employed every day. The big difference seems to be a desire to work. There is nothing in the record before the Court to show that either the appellee or her children suffered from poor health or had any other special problem, such as lack of education, which kept her out of the labor market.

B. Connecticut's Historical Right to Legislate for the Public Welfare.

The State of Connecticut prior to the adoption of the Constitution possessed sovereign powers including the regulation of its police powers, and certainly the adoption of the United States Constitution did not create the powers of the state but only limited such power, and except as so limited the power of the state remains supreme. *Carter* v. *Carter Coal Co.*, 298 U.S. 238, 294. How then may we ask has there been created in the federal judiciary the power to cut down this fundamental police power of the State of Connecticut to enact legislation in the field of public welfare which is civil in nature, not permanent in its effect on any party, and deals with the spending of Connecticut tax raised funds.

"The Fourteenth Amendment, itself a historical product, did not destroy history for the states and substitute mechanical compartments of law all exactly alike. If a thing has been practiced for two hundred years by common consent it will need a strong case for the Fourteenth Amendment to affect it . . ." *Jackman* v. *Rosenbaum*, 260 U.S. 22, 31. This should be particularly true where the statute sought to be called unconstitutional is not racially aimed or motivated.

"The historical context in which the Fourteenth Amendment became a part of the Constitution indicates the matter of primary concern was the establishment of equality and enjoyment of basic civil and political rights from the discriminatory action on the part of the state based on consideration of race and color and the provisions of the amendment are to be construed with this fundamental purpose in mind." *Shelly* v. *Kraemer*, 334 U.S. 1, 23.

This principle was recently reiterated in the *McLaughlin* v. *Florida*, 379 U.S. 184, 192 where the Court stated in part "the central purpose of the Fourteenth Amendment

was to eliminate racial discrimination emanating from official sources in the state, and the United States Supreme Court must be especially sensitive to Fourteenth Amendment policies where racial classification is embodied in a criminal law." See also *Bolling* v. *Sharpe*, 347, U.S. 497, 499 and *Konematsu* v. *The United States*, 323 U.S. 214, 216.

The question therefore should be should the Courts peruse a statute such as 17-2d, which is not racially aimed, but is claimed to violate the principles and immunities and equal protection clauses of the Fourteenth Amendment, with the same gimlet eye that they would in cases where it is obvious that these statutes are aimed racially?

State legislatures are presumed to have acted within their constitutional powers despite the fact that in practice their laws may result in some inequality. A statutory discrimination will not be set aside if any set of facts reasonably may be conceived to justify it. While no precise formula has been developed, the Fourteenth Amendment permits a wide scope of discretion in enacting laws which will affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the state's objective. *McGowan* v. *Maryland*, 366 U.S. 420, 425. See also *Breedlove* v. *Suttles*, 302 U.S. 277, 281; *Stebbins* 1. Riley, 268 U.S. 137, 142 and *Allied Stores of Ohio* v. *Bowers*, 358 U.S. 522, 527. A state should have considerable leeway in analyzing local problems and prescribing appropriate cures and there is no privileges and immunities violation if there are valid independent reasons for disparity of treatment *Toomer* v. *Witsell*, 334 U.S. 385, 396.

Connecticut should be allowed great latitude in passing a statute such as 17-2d, which statute should be struck down only if the discrimination is invidious and obnoxious. *Morey* v. *Dowd*, 354 U.S. 457, 463.

AND it should be shown by the appellee that the claimed inequity is actually and palpably unreasonable and arbitrary. *Frost* v. *Court Commission of Oklahoma*, 278 U.S. 515, 522.

With the state historically possessing these powers to pass laws for the public welfare without undue interference, the question emerges: is it a privilege and immunity of a citizen of the United States to impose on any state of his choice the burden of supporting himself and his family before he has satisfied a reasonably limited residence requirement? To hold that the Fourteenth Amendment protects the right of a citizen to be supported at public expense in any community to which he may journey, it has to follow that there is inherent in state citizenship a constitutional right to be supported at public expense free from any limitations whatsoever. No such right exists. In fact, just the opposite is true. There is no constitutionally imposed or common law duty on any state to provide public assistance. *People ex rel Heydenreich* v. *Lyons*, 30 N.E. 2d 46, 51. See also *in re Chirillo*, 28 N.E. 2d 890. *Jennings* v. *Davidson County*, 344 S.W. 2d 359, 362 and *Division of Aid for the Aged, Department of Public Welfare* v. *Hogan*, 54 N.E. 2d 781, 782.

C. The Legislative Reason for Passing Section 17-2d of the Connecticut General Statutes.

As has been previously stated a statute should be constitutional if it has some relation to the problem the legislature reasonably believes it faces, and it is not obnoxious, invidious and irrelevant to those problems. Whether or not it meets the tests is shown by: 1. A long history of this type of statute with many states having similar statutes and tacit congressional approval; 2. The size and growth of the state's welfare burdens and the background of liberality of the state legislature in programs that it has already carried out; and 3. The safeguards in the particular statute such as (a) its permanent effect on the persons allegedly discriminated

against, (b) whether it has criminal penalties, and (c) whether it is racially aimed.

Thirty-nine other states have statutes similar or more onerous than Connecticut concerning residency requirements for welfare applicants. [Stipulation of Facts 61 A, 45a] These statutes have been on the books in most states at least since the early days of the Social Security Laws, and in many cases residency laws were on the books prior to the creation of the federal government. The Congress has long recognized them in passing 42 U.S.C. 602b.

It would seem to be an exercise in judicial arrogance to hold that 17-2d is unconstitutional. In effect the Court would be saying that it is much more competent to say what constitutes public welfare and what is justice than the members of the legislatures of 40 states who passed these laws and continue to keep them on the books, the governors of the 40 states who sign these bills into law, and the Congress of the United States who have expressly recognized the problem and agreed that residency requirements are fair and equitable under all the facts available to the Congress and the President who signed the bill into law. This is particularly true when one considers that the ADC welfare burden in Connecticut in the seven-year period, from 1960 through 1966 has gone from 26,076 persons to 48,485, or nearly doubled. [Stipulation of Facts 60, A 45a]

Connecticut has long been a leader in a field of public fare. It has an open end budget so that no qualified applicant will be denied any type of welfare because the specific appropriation has run out. It ranks fourth in the nation in monthly payments of $197 for a family of four as against a national average of $148. [Pocket Data Book U.S.A., 1967, United States Department of Commerce. Statistical Reports Division, Library Congress card #A66-7638]. In fact the 1967 legislature has paassed an act concerning the establishment of

a cost of living commission which will in all probability put Connecticut at the top of the nation in its welfare expenditures per person. [Public Act 744, Public Acts of Connecticut, December Special Session 1965 and January Session 1967].

Representative Morris Cohen, Chairman of the House Welfare Committee for the Connecticut General Assembly clearly expressed the state's reasonable fear and its objective when moving for the acceptance and passage of the joint committee's favorable report on Section 17-2d when he stated as follows: "The laws of most states provide that public assistance will not be granted to anyone who has not been a resident of the state for a period of time usually varying from one year to five years. At present, Connecticut has no residency law. Our high cost of welfare is well known to all of us. It has probably nearly doubled since 1961. And this, in spite of a period of very high level prosperity. There are some people who come to Connecticut simply to get benefits of public assistance but the proportion of these is small. As responsible legislators we must at some point be interested in cost. I doubt that Connecticut can and should continue to allow unlimited migration into the state on the basis of offering instant money and permanent income to all who can make their way to the state regardless of their ability to contribute to the economy." [HB 82 Connecticut General Assembly House Proceedings, February Special Session 1965. Volume II Part 7, Page 3504.]

The question, faced up by the Connecticut Legislature, was whether unlimited migration of those poor who do not want to enter the labor market should be allowed, with the end result that Connecticut's liberal programs would be curtailed because of this additional tax bite, or whether Connecticut should set up a reasonable residence requirement that protected, at least in the first instance those poor resident applicants, who in the past, had contributed to the economy. The legislature wisely chose the latter course.

D. The Weakness of the Lower Court's Decision.

When reading the majority opinion, one looks in vain to find a single case cited by them that could reasonably have upheld their decision. The only conclusion the appellant can reach is that the Lower Court majority could find none.

To justify their decision the Lower Court quoted cases in which statutes were struck down for violating First Amendment rights, Fifth Amendment rights, and statutes that were racially aimed. All these statutes in the cases cited by the Lower Court differed from Section 17-2d and from at least one to a total of six very important distinctions:

(1) These quoted cases either involved criminal statutes which 17-2d is not; (2) They were permanent in their effect on the parties aimed at, which 17-2d is not; (3) They were racially aimed, which 17-2d is not; (4) They took away acquired property rights, which 17-2d does not; (5) They acted in a positive manner on the parties aimed at, which 17-2d does not; and (6) these statutes being declared unconstitutional by the Courts did not have the effect of telling that particular state how it would spend its own tax raised funds, which the majority decision in this case does.

The vice of using First Amendment cases to justify striking down a statute that is not racially aimed for violating the equal protection clause and privileges and immunities clauses is obvious. First Amendment rights occupy a preferred position in the galaxy of constitutional rights. *Kovacs* v. *Cooper*, 336 U.S. 77, 93; *Jones* v. *Opelika*, 316 U.S. 584, 600; *Marsh* v. *Alabama*, 326 U.S. 501, 509.

This being so the Court naturally should more closely scrutinize claimed violations of First Amendment rights and be more quick to strike down statutes which appear to curtail them. But should this standard be applied when viewing a

statute, not racially aimed, where there is a long history of use by many states with the consent of Congress, when the claimed constitutional violation is that of the Fourteenth Amendment? Clearly the answer should be "NO!" How then can the Lower Court justify *Sherbert* v. *Verner*, 374 U.S. 398; *Zemel* v. *Rusk*, 381 U.S. 1; *Dombroski* v. *Pfister*, 380 U.S. 479; *Aptheker* v. *Secretary of State*, 378 U.S. 500; *Speiser* v. *Randall*, 357 U.S. 146; *Kent* v. *Dulles*, 357 U.S. 116 as precedents in answering the question raised in the present case.

An example of how the Lower Court had to strain is shown where they say "Because Connecticut General Statutes 17-2d has a chilling effect on the right to travel, it is unconstitutional." [A, 25a] Does this fine sounding phrase "chilling effect" appear in a case which involves a statute similar to 17-2d? No. It was taken from *Dombrowski* v. *Pfister*, 380 U.S. 479, 487, which involved a criminal statute that was racially aimed; and the Court in that case said that if persons had to wait until they were prosecuted or perhaps convicted under the criminal statute in question, before they could raise the constitutional issue on appeal, it would have "chilling effect" on the exercise of their First Amendment rights.

This is a far cry from the context in which it was used in the present case.

In using the First Amendment case *Sherbert* v. *Werner*, 374 U.S. 398 to justify their decision the Lower Court again strained a First Amendment case. In the present case before the Court the appellee Thompson is clearly getting a gratuity from Connecticut. She has never contributed anything to the Connecticut economy before nor has she up until the present moment as she is now on welfare. However the Lower Court talks about the plaintiff in the Sherbert case getting a gratuitous benefit. Clearly she got no gratuitious benefit. There the plaintiff worked to earn her right to unemployment compensation. It was a property right she had acquired by the sweat

of her brow working for her employer. Contrast that so called "gratuitous benefit" with the present case.

In fact, the only two cases cited by the Lower Court that are Fourteenth Amendment cases in which the statutes are not racially aimed are *Carrington* v. *Rash,* 380 U.S. 513 and *Edwards* v. *California,* 314 U.S. 160.

The Carrington case is clearly distinguishable. First the imposition on the member of the armed forces to prevent him from voting was permanent. He could not vote in Texas if he lived there for a thousand years, and it applied to any election in that state. Secondly the Court in striking down this section of the Texas Constitution was not telling Texas how to spend Texas tax raised funds or directly increasing Texas' tax burden.

But even in this case the Court said "Texas has unquestioned power to impose reasonable resident restrictions on the availability of the ballot." *Carrington Supra,* Page 91.

E. The Applicability of the Edwards Case.

The case, on which not only the Lower Court but nearly all writers in the field of residence requirements for the poor hang their hat on, is *Edwards* v. *California,* 314 U.S. 160. The appellant will agree that it is a case which probably reached a correct decision, but it certainly should not be used to strike down Section 17-2d of the Connecticut General Statutes. The statute in question in the Edwards case was a criminal statute where the violator faced a possible jail sentence and a fine. There is not much question that this would have a "chilling effect" if one wanted to come into California in the late 1930s.

In contrast Section 17-2d is a civil statute. It stops no one from coming into Connecticut. It effects no one's property rights or freedom to settle any place or at any time in Connecticut. The proof that it had no real effect on Miss Thompson's

freedom of movement is that before the Lower Court could reach its decision she was drawing her state welfare check, and there is no evidence in the record that she suffered at all in her health, liberty, or pursuit of happiness during the one-year period of residency.

The decision in the Edwards case did not have the effect of telling California that they had to give Duncan welfare or how they would spend their tax raised funds. In fact, as Justice Byrnes pointed out Duncan got aid from the Farm Security Administration which was wholly financed by the Federal Government.

There is also a big difference between Duncan and Miss Thompson. Duncan had worked while in Texas and was ready and willing to work when he came to California. The statute under which he applied for relief made it a condition that "in making any relief payments under this section the Secretary of Agriculture is authorized to require of employable recipients of such payments the performance of work on useful public projects." [Works Administration, Chapter 252 Section 3a, Page 927 of U.S. Statutes at Large. Volume 53, Part 2 Public Laws, June 30, 1939.]

In fact the whole tenor of the relief acts that were first passed by the 73rd Congress and reaffirmed by subsequent Congress up until the Second World War were to increase employment and provide work, not to give welfare checks to anyone who had a desire to avoid the labor market.

Even Edwards' lawyer, Mr. Slaff, and the Select Committees' lawyers, Mr. Tolan and Mr. Silverman, did not envision their case as being a precedent that an indigent who was not ready or willing to enter the labor market should be entitled to welfare. The thrust of both their briefs stands solely for the proposition that an unemployed man who was indigent and who was willing to work should be able to travel freely

from state to state seeking employment. There is nothing in their briefs to show that an indigent who will not work should have an automatic right to impose himself on the welfare rolls of any state of his choice and get instant welfare. *Edwards Supra,* Pages 161 through 166.

Another distinction in contrasting the reasonableness of the two statutes involved is their permanent affect on the parties. Under the California statute it was always a crime to knowingly bring an indigent into the state. The Connecticut statute has an outside maximum of one year.

However the most telling argument against applying the Edwards' case as a rational to strike down 17-2d is the fact that if Duncan were to come into Connecticut today under the same circumstances he came into California he would be eligible immediately for welfare for sixty days; and because he was willing to work or be trained for work he could get welfare over the whole residency period either by registering at the Connecticut Unemployment Office and actively seeking work or entering into one of the state or federally financed training programs..

It should perhaps be further noted that the cases cited by Justice Douglas to support his concurring opinion, *Crandall* v. *Nevada,* 6 Wall 35, and the *Slaughterhouse Cases,* 16 Wall 36, could not be fairly applied here. In the former case, the taxing of persons leaving Nevada not only affected their right to cross the state line, it took property away from them without due process of law. The Slaughterhouse Cases were really cases involving a statute that created a tight, lucrative little monoply for the Crescent City Stock and Slaughterhouse Company to the exclusion of all competitors. What monopoly of rights to a small group is created by 17-2d?

The statute in the Edwards case may have had a "chilling effect" on interstate travel but the holding of the majority in the Lower Court in the present case stands for the proposition of subsidized settlement.

This certainly flies in the face of what was said in the Sherbert case, Supra, Page 412 where this Court said that although the exercise of religious rights under the First Amendment was a constitutional right, it was not a financially subsidized one. See also *Sweeney* v. *State Board of Public Assistance*, 36 F. S. 171, 174 affirmed 119 F. 2d 1023. Cert. denied 314 U.S. 611.

As Judge Jackson stated in the Edwards case, while indigence was not to be a basis for denying rights neither was it a source for granting them; that the state of being without funds was neutral fact. *Edwards Supra, Page* 184.

F. The Lower Court's Decision in Effect Tells Connecticut How it Must Spend its Own Tax Raised Funds.

The appellant could find no cases in which the United States Supreme Court in deciding a Fourteenth Amendment case told the state involved how they should spend their own state tax raised funds. Under the the Aid to Dependent Children program the state pays for 54% and under the Town Aid program the total contribution from state and local taxes is 77%.

By telling the state that 17-2d is unconstitutional and that they must give the appellee aid, the Lower Court majority have usurped a function of the legislative branch, which spending function is one the judiciary never enters.

The Federal Courts should be extremely cautious in strik-

ing down statutes that involve the spending of state tax raised funds or the state's power to legislate for the public welfare may be seriously curtailed. *Everson* v. *Board of Education, Township of Ewing,* 330 U.S. 1, 6.

Conclusion

Historically pauper relief has been a local and state function. It was not intended by the Fourteenth Amendment that all matters formerly within the exclusive cognizance of the state should become matters of national concern. *Snowden* v. *Hughes,* 321 U.S. 1, 11.

The Fourteenth Amendment was not intended to strip the states of their power to meet problems previously left to individual solution. *Everson case, Supra,* Page 7.

Because the Aid to Dependent Children per case load doubled from 1960 to 1967 with the cost going higher and higher, there is a practical limit to the amount of tax dollars that can be raised. The question that faces the Connecticut legislature is whether the load should be allowed to increase indiscriminately with the results that the very liberal program on the books will be lowered with Connecticut in a race with other states to see who can reach the lowest common denominator of aid, or whether Connecticut can set up some reasonable classification to control its case load. Even if the legislature was unduly worried and the problem did not arise in the dimensions they expect, it is not for the Court to say its guess is best and should be substituted for that of the legislature.

If Connecticut is to spend its tax money to support paupers, it certainly seems reasonable it should use its own tax

money first on those persons who would have contributed to the economy or demonstrated a willingness to do so.

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APPENDIX A

SECTION 17-2d OF THE 1965 SUPPLEMENT TO THE CONNECTICUT GENERAL STATUTES.

SECTION 17-2d ELIGIBILITY FOR TEMPORARY AID PENDING RETURN OF NON-RESIDENTS.

When any person comes into this state without visible means of support for the immediate future and applies for Aid to Dependent Children under Chapter 301 or general assistance under Part I of Chapter 308 within one year from his arrival, such person shall be eligible only for temporary aid or care until arrangements are made for his return, provided ineligibility for Aid to Dependent Children shall not continue beyond the maximum federal resident requirement. (1963 P.A. 501, S. 1.2; February, 1965 PA 564 (a).

APPENDIX B

Section 17-2d-1

Eligibility of Nonresidents Applying for Aid

Sec. 17-2d-1. Definitions.

As used in Section 17-2d of the 1965 Supplement to the General Statutes:

(a) "Arrival" is the establishment of a place of abode in Connecticut with intent to remain;

(b) "Visible means of support" consists of resources owned by the applicant, or income from regular employment other than seasonal or short-term, which resources or income are sufficient to enable the members of the family unit for whom assistance is sought to be self-maintaining in accordance with standards of public assistance;

(c) "Immediate future" is a period of not less than three months from the date of arrival in Connecticut;

(d) "Temporary aid or care" is welfare assistance granted to an applicant . . . up to the point at which arrangements as defined in this section have been made . . ., *provided such arrangements shall be made within sixty days from the date of application for aid;*

(e) "Arrangements" consists of a transportation plan for . . . return of *an applicant,* made by the agency to which application for assistance has been made; . . .

(f) "Return" means return to the place from which the family unit came to Connecticut;

(g) "Applicant" shall include members of the family unit for whom assistance is sought.

(Adopted May 3, 1966; amendment effective July 12, 1966.) Section 17-2d-2. Exceptions. The provisions of Section 17-2d of the 1965 Supplement to the General Statutes shall not apply to persons coming into Connecticut from a state with which Connecticut has a formal agreement waiving residence under the provisions of Section 17-10 of the General Statutes or to persons coming into Connecticut from a state which has enacted an inter-state compact similar to that contained in Sections 17-21a to 17-21d, inclusive, of the 1965 Supplement to the General Statutes. (Effective May 3, 1966.)

APPENDIX C

MANUAL VOL. 1 — CHAPTER II

CONNECTICUT STATE WELFARE DEPARTMENT

SOCIAL SERVICE POLICIES — PUBLIC ASSISTANCE

NONRESIDENTS — AFDC AND GENERAL ASSISTANCE

219.2 CRITERIA — For determining that a person or family is eligible for assistance:

1. If the application for assistance is filed within one year after arrival in Connecticut, the applicant must establish that he was self-supporting upon arrival and for the succeeding three months thereafter; or

2. If the application for assistance is filed within one year after arrival in Connecticut, the applicant must clearly establish that he came to Connecticut with a bona fide job offer; or

3. If the application for assistance is filed within one year after arrival in Connecticut, the applicant must establish that he sought employment and had sufficient resources to sustain his family for the period during which a person with his skill would normally be without employment while actively seeking work. Personal resources to sustain his family for a period of three months is considered sufficient. Those who come to Connecticut for seasonal employment such as work in tobacco or short term farming are not deemed to have moved with the intent of establishing residence in Connecticut.

219.3 Application of Policy

If application for assistance is made within the one year period after the family's arrival in Connecticut with no visible means of support for the first three months after arrival and need is found to exist, it is the responsibility of the local Welfare Department to grant temporary assistance when the family does not meet the eligibility requirements for AFDC. If the family is otherwise eligible, AFDC is granted for a temporary period.

Temporary assistance may continue during the time arrangements are being made for returning a family to its former residence, but such arrangements will be completed within sixty days.

The worker will discuss the total situation with the family and if they wish to remain in Connecticut, it will be necessary for them to understand that they must be self-supporting since they will not be eligible to continue to receive AFDC or General Assistance. The family members are helped to evaluate realistically their plans and capabilities for self-support. If after a reasonable period of counseling, the family is unable to develop plans for self-support, arrangements for return are undertaken immediately and will be completed within sixty days. If the family does not wish to return, assistance will be discontinued *even though* the sixty day maximum period that temporary assistance may be given has not elapsed. Families who come to Connecticut from a State with which we have a formal reciproeal agreement waiving residence, will not be affected by this policy.

219.4 CRITERIA for "Self-Support"

Arrangements may be delayed up to the sixty day maximum from the date of application as the worker deems

appropriate to give the applicant time to become self-supporting if he has evidenced a desire and has the capability to become self-supporting.

Where there is potential for self-support and the applicant has a real interest or a plan to become self-supporting, assistance may be continued during the period counseling is given to help applicant achieve self-support.

Appropriate areas of counseling include referral to employment agencies such as the Connecticut State Employment Service, day care planning, referral to a "skill center" for further development of job skills, or referral to a work training project such as Title V. If further job training is to be undertaken, the training course must be approved by the worker, must be realistic in terms of the capabilities of the applicant, and must prepare the applicant for employment. If the applicant does not need additional job training he must make a sincere effort to seek and obtain employment. The applicant will be considered "self-supporting" and therefore not subject to be returned to the place he came from if within the sixty day period he has obtained regular employment or is enrolled in a work training course, approved by the worker, which will bring regular employment. If the training course cannot be completed within the sixty day period, assistance will be continued until the course is completed and the applicant obtains regular employment. Throughout the period the applicant is seeking employment or is undertaking job training, the worker will continue counseling services to the applicant to help him with problems which arise. If the applicant does not show a genuine effort to seek employment or does not show progress in an approved training course, arrangements for return will be made immediately and there is no further eligibility for assistance after the completion of the arrangements for return. If the applicant is eligible for Title V

and is assigned to a Title V project, assistance would then be given under the Group II provisions of that program. Assignment may be made to a Title V Group II project by the Department without referral from the local Welfare Department. For procedures, refer to Departmental Bulletin No. 1723.

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Supreme Court of the United States

OCTOBER TERM, 1968

No. 33

WALTER E. WASHINGTON, et al., *Appellants*,

v.

MINNIE HARRELL, et al., *Appellees*.

Appeal from the United States District Court for the District of Columbia

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1967

No. 1134

WALTER E. WASHINGTON, et al., *Appellants*,

v.

MINNIE HARRELL, et al., *Appellees*.

Appeal from the United States District Court
for the District of Columbia

OPINION BELOW

The majority and dissenting opinions of the three-judge court of the United States District Court for the District of Columbia may be found in —— F. Supp. —— (A. 56).

JURISDICTION

The decree of the three-judge court declaring certain provisions of the District of Columbia Public Assistance Act repugnant to the Constitution of the United States and permanently enjoining their enforcement was entered on November 28, 1967 (A. 88-89). Notices of appeal were filed on December 22, 1967, and the record was docketed

in the Supreme Court of the United States on February 20, 1968. Jurisdiction of this Court is invoked under Title 28 of the United States Code, Section 1253, which provides for direct appeals from decisions of three-judge courts.

STATUTE INVOLVED

The District of Columbia Public Assistance Act of 1962, 76 Stat. 914, Pub. L. 87-807, § 4, District of Columbia Code, § 3-203 (1967), provides, in pertinent part:

> "Public Assistance shall be awarded to or on behalf of any needy individual who either (a) has resided in the District for one year immediately preceding the date of filing his application for such assistance; or (b) who was born within one year immediately preceding the application for such aid, if the parent or other relative with whom the child is living has resided in the District for one year immediately preceding the birth * * * ."

QUESTION PRESENTED

Whether the provisions of the District of Columbia Public Assistance Act of 1962, which make residence in the District of Columbia for one year a condition for eligibility for public assistance, are repugnant to the Constitution of the United States.

STATEMENT OF THE CASE

Appellants are officials of the District of Columbia Government charged with the responsibility of administering the District of Columbia Public Assistance Act of 1962. Appellees are members of a class of residents of the District of Columbia whose applications for public assistance were denied by appellants because they had not, as required by the Act, resided in the District of Columbia

for one year immediately preceding the dates of their applications.

Appellee Minnie Harrell and her children moved to the District of Columbia from New York on September 3, 1966, and applied for public assistance on May 12, 1967 (A. 7-8). Appellee Clay Mae LeGrant and her children moved to the District of Columbia from South Carolina on March 15, 1967, and her application for public assistance was denied on July 27, 1967 (A. 45). Appellee Gloria Jean Brown moved to the District of Columbia from Arkansas on February 5, 1966; her oldest child had been living with appellee's father in the District of Columbia since 1962; her two other children arrived in the District of Columbia in late August 1966; and a fourth child was born in the District of Columbia on November 12, 1966. Public assistance was applied for shortly after the birth of the fourth child. (A. 35.) Appellee Vera M. Barley arrived in the District of Columbia in March of 1941; and was committed to St. Elizabeths Hospital, a public mental institution, on April 1, 1941 (A. 20-21). She has been deemed eligible for release from St. Elizabeths Hospital into a foster care home since September 15, 1965, and her application for public assistance was filed on January 19, 1967 (A. 22). Under the regulations in force in the District of Columbia, residence is not acquired while one is a patient in a public institution.

Each of the appellees brought an action in the United States District Court for the District of Columbia seeking declaratory and injunctive relief. The gravamen of their complaints was that the provisions of the Public Assistance Act, under which their applications were considered and denied, are unconstitutional. (A. 4, 18, 32, 42.) The actions were consolidated, and, pursuant to 28 United States Code, § 2282, a three-judge court was convened. Following a hearing, the court, with one judge dissenting, held those provisions of the Act which make residence in

the District of Columbia for one year a condition for eligibility for public assistance repugnant to the Constitution of the United States (A. 56), and permanently enjoined appellants from enforcing or giving any legal effect to such provisions (A. 88).

ARGUMENT

Congress may constitutionally impose a one-year residence requirement as a condition for eligibility for public assistance in the District of Columbia.

Statutory residency requirements for public assistance, similar to those here involved, have been in effect in the great majority of jurisdictions throughout the United States for many years. Until recently, the constitutionality of such provisions was seldom challenged, and such challenges as were made were uniformly rejected. See, i. e., *People ex rel. Heydenreich* v. *Lyons*, 374 Ill. 557, 30 N. E. 2d 46 (1949).

Questions involving the constitutionality of statutory residency requirements for public assistance have recently been presented to three-judge District Courts in several jurisdictions.

In *Thompson* v. *Shapiro* (D. C. Conn. 1967), 270 F. Supp. 331, the court (with one judge dissenting) adjudged unconstitutional the Connecticut statute.

In *Green* v. *Department of Public Welfare of State of Delaware* (D. C. Del. 1967), 270 F. Supp. 173, the court declared the Delaware statute to be unconstitutional.

In the case at bar, the District of Columbia statute was held unconstitutional by a vote of two to one. *Harrell* v. *Washington* (D. C. D. C. 1967), 270 F. Supp. —— (A. 56).

In granting a preliminary injunction in *Ramos* v. *Health and Social Services Board of State of Wisconsin* (D. C. E. D. Wisc. 1967), 276 F. Supp. 474, the court expressed the opinion that the Wisconsin statute was unconstitutional.

By a two to one decision, the court in *Smith* v. *Reynolds* (D. C. E. D. Pa. 1967), 277 F. Supp. 65, declared unconstitutional the Pennsylvania statute.

In *Waggoner* v. *Rosenn* (D. C. M. D. Pa. 1968), —— F. Supp. —— (Civil Action No. 9841), the court, by a two to one decision, upheld the constitutionality of the Pennsylvania statute.

Other cases, including *Mantell* v. *Dandridge* (D. C. Md., Civil Action No. 18792), *Johnson* v. *Robinson* (D. C. N. D. Ill., Civil Action No. 67-1883), and *Marshall* v. *California Department of Social Welfare* (D. C. N. D. Cal., Civil Action No. 47401), are pending, in some of which preliminary injunctions have been entered.

In those instances in which the court struck down the residency requirement, it did so primarily on the ground that the statutes involved offended the equal protection clause of the Fourteenth Amendment. Expressly in *Thompson* v. *Shapiro, supra,* and by implication in some of the other cases, the court also adjudged the respective statutes invalid because they imposed "a chilling effect" on the constitutionally protected right to travel.

In striking down the challenged provision of the Act of Congress, D. C. Code, § 3-203 (1967) (hereinafter § 3-203), the court below declared that it was relying on "* * * considerations which stem primarily from the equal protection of the laws guaranteed by the Fourteenth Amendment and applicable to this jurisdiction by reason of the Due Process Clause of the Fifth Amendment" (A. 61, footnote omitted).

The court noted that the "* * * basic purpose [of the legislation], simply stated, is to aid members of the community who are in need * * *" (A. 69), and that § 3-203 "* * * creates two classes of persons; those who have resided in the District of Columbia for one-year or longer, and those who have resided here for less than one year" (A. 65). The court reasoned that this classification is

invalid because it is "without a reasonable relation to the purposes of the legislation" (A. 65).

In discussing the various considerations which may have motivated the Congress to enact § 3-203, the court observed that:

> (a) If the purpose of the Congress was "to protect this jurisdiction from an influx of persons seeking more generous public assistance than might be available elsewhere" (A. 66), under *Edwards* v. *California*, 314 U. S. 160 (1941), this was a "constitutionally impermissible basis" (A. 68).
>
> (b) If the purpose of the Congress was "to prevent abuse of the public assistance program" (an admittedly valid purpose), § 3-203 is, nevertheless, "too broad to be sustained," because, in the court's view, there are other and less onerous means of accomplishing this purpose (A. 68-69).
>
> (c) If the purpose of the Congress was "to confine assistance to domiciliaries of the jurisdiction" and it utilized a one year residency requirement as a means of providing "an objective legislative test of such status," such means is constitutionally invalid because § 3-203 excludes persons who are "bona fide domiciliaries" in the sense that they are living in the jurisdiction with an intention to remain indefinitely (A. 70).

In evaluating the constitutionality of § 3-203, the nature of the benefits conferred must be kept in mind. They are not contractual benefits or insurance. Plainly, § 3-203 confers no vested right. *Cf. Lynch* v. *United States*, 292 U. S. 571 (1934); *Frisbie v. United States*, 157 U. S. 160, 166 (1895); *Pennie* v. *Reis*, 132 U. S. 464 (1889); *United States* v. *Teller*, 107 U. S. 64, 68 (1882). Any challenge to the constitutionality of § 3-203 must, therefore, be viewed in light of the Court's pronouncement in *United States* v. *Cook*, 257 U. S. 523 (1922), that:

> "* * * Congress in shaping the form of its bounty may impose conditions and limitations

on its acquisition and enjoyment by the beneficiaries *which it could not impose on the use and enjoyment by them of a vested right.*"
[257 U. S. at 527; emphasis added.]

The basic flaw in the majority opinion is that, in concluding that § 3-203 creates an unconstitutional classification, it ignores the constitutional standards applicable to benefit legislation and applies instead those applicable in cases which involve preferred freedoms. In this connection, the court's reliance on *Sherbert* v. *Verner*, 374 U. S. 398 (1963), is illuminating. There, the claimant's right to unemployment insurance benefits, from a fund to which she had contributed, was conditioned upon her willingness to violate a cardinal principle of her religious faith. Benefits were denied her because she refused to engage in employment requiring her to work on her Sabbath. Because the case thus fell squarely within a First Amendment area, this Court refused to apply the test enunciated in *Flemming* v. *Nestor*, 363 U. S. 603 (1960), which would require that the applicable statute be upheld upon a "showing merely of a rational relationship to some colorable state interest * * *." (374 U. S. at 406.) Instead, the Court considered controlling *Speiser* v. *Randall*, 357 U. S. 513 (1958), a case also involving a preferred First Amendment freedom.

The instant case involves no preferred First Amendment freedom. Appellees were not denied welfare benefits because of considerations even remotely related to their religious beliefs or their association with any alleged subversive organization. Benefits were denied simply because appellees had not resided in the District of Columbia for one year. Any analogy with either *Speiser* or *Sherbert*, therefore, is untenable.

Although *Flemming* v. *Nestor*, *supra*, clearly militates against the soundness of the ruling below, its application to the instant case was, for all practical purposes, ignored by the majority opinion. In *Flemming*, the Court was

concerned with a provision in the Social Security Act which severed old age and disability insurance benefits from any person deported from the United States pursuant to statute. Unlike here, the benefits were afforded pursuant to a contributory insurance scheme to which the insured had made periodic payments. Nonetheless, the Court concluded that the statutory provision authorizing the cutting off of the benefits was a valid exercise of the legislative power of the Congress, saying (363 U. S. at 611):

> "* * * In judging the permissibility of the cut-off provision of * * * [§ 402(n)] from this standpoint, it is not within our authority to determine whether the Congressional judgment expressed in that section is sound or equitable, or whether it comports well or ill with the purposes of the Act. 'Whether wisdom or unwisdom resides in the scheme of benefits set forth in Title II, it is not for us to say. The answer to such inquiries must come from Congress, not the courts. Our concern here, as often, is with power, not with wisdom.' * * * *Particularly when we deal with a withholding of a noncontractual benefit under a social welfare program such as this, we must recognize that the Due Process Clause can be thought to interpose a bar only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification.*" [Emphasis added.]

In determining whether there is rational justificatoin for a statutory classification, it is constitutionally irrelevant whether the assigned justification "underlay the legislative decision." *Flemming* v. *Nestor, supra,* 363 U. S. at 612. Stated another way, "a statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan* v. *Maryland,* 366 U. S. 420, 426 (1961). And see *Heath & Milligan Co.* v. *Worst,*

207 U. S. 338, 354-355 (1907); *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 78-79 (1911); *Steward Machine Co.* v. *Davis*, 301 U. S. 548, 585 (1937); *United States* v. *Petrillo*, 332 U. S. 1, 8-9 (1947).

There is "rational justification" for the residency requirement contained in § 3-203. As noted by Judge Holtzoff in his dissent below, the average monthly welfare grant made by the District of Columbia is considerably in excess of grants made by neighboring jurisdictions (A. 82-83). Absent the residency requirement of § 3-203, an overall reduction of grants available to eligible persons might logically ensue. This Court has recognized the problem involved. In *Helvering* v. *Davis*, 301 U. S. 619, 644 (1937), in upholding the constitutionality of the Federal Social Security Act, it said:

> "* * * A system of old age pensions has special dangers of its own, if put in force in one state and rejected in another. The existence of such a system is a bait to the needy and dependent elsewhere, encouraging them to migrate and seek a haven of repose. * * *"

And see Havith, *The Constitutionality of Residence Tests for General and Categorical Assistance Programs*, 54 Cal. L. Rev. 567, 618 (1966), in which the commentator observes:

> "A fair conclusion seems to be that in at least some states, it is not unreasonable for the legislature to conclude that a useful saving in welfare costs may be obtained by residence tests discouraging those who would enter the state solely because of its welfare programs. In New York, for example, a one per cent saving in welfare costs would amount to several million dollars."

As Judge Clarie makes plain in his dissenting opinion in *Thompson* v. *Shapiro*, 270 F. Supp. at 340, durational residence requirements in numerous areas of the law have

been "established through several generations of orderly growth." If the principle articulated by the majority opinion below is countenanced by this Court, the continuing validity of all such requirements will obviously be undermined.

As the court below recognized, it was obviously the purpose of the Congress to confine welfare benefits to domiciliaries of the District of Columbia, as distinguished from persons merely sojourning temporarily in the jurisdiction. This is certainly a constitutionally permissible purpose. As the innumerable cases in which courts have struggled with the problem amply attest, whether or not a person is a resident of or domiciled in a particular jurisdiction frequently requires the consideration and resolution of complex and difficult questions of fact and law. In light of these well-known problems, it was well within the realm of legislative discretion for the Congress to enact an objective legislative test for determining who is a resident of the District of Columbia for purposes of public assistance. This the Congress accomplished by § 3-203. Contrary to the holding of the majority below, such a test bears a direct and reasonable relationship to the purpose of legislation.

Although the court below did not expressly hold that § 3-203 infringed appellees' constitutionally protected right to travel, its strong reliance on *Edwards* v. *California*, 314 U. S. 160 (1941), would indicate that it may have inferentially done so. In *Edwards*, the Court struck down a California statute making it a misdemeanor to knowingly bring or assist in bringing a non-resident indigent into the state. The majority concluded that the statute "imposed an unconstitutional burden on interstate commerce." 314 U. S. at 177. The statute construed in *Edwards* not only placed a direct restriction on interstate travel, but provided for criminal sanctions as well. Clearly, *Edwards* did not condemn all legislative action which may make entry

into a jurisdiction less advantageous than it might otherwise have been, and no decision of this Court has gone that far.

Recent decisions of this Court upholding the right to travel involved affirmative attempts by officials to create a direct blockage. See *Zemel* v. *Rusk*, 381 U. S. 1 (1965); *Aptheker* v. *Secretary of State*, 378 U. S. 500 (1964); *Kent* v. *Dulles*, 357 U. S. 116 (1958). For this reason alone, they would seem to have little application here. See Note, *Analysis of Welfare Residence Requirements in Light of Recent Decisions*, 29 U. Pitt. L. Rev. 138, 141 (1967). Moreover, appellees' asserted right to travel cannot be linked with the attempted exercise of a preferred First Amendment freedom as was claimed to be the case in *Aptheker* and *Kent*, *supra*, in which passports were revoked or denied because of alleged subversive associations. Cf. *Zemel* v. *Rusk*, *supra*, 381 U. S. at 16. It warrants emphasis, therefore, that the stricter standards of review applied by the Court in *Aptheker*, where the right to travel was entwined with the First Amendment freedom of association, cannot be justified in the case at bar.

In *United States* v. *Guest*, 383 U. S. 745 (1966), six individuals were charged in an indictment with a conspiracy, the objects of which were, *inter alia*, to shoot, beat, and kill Negro citizens who were attempting to use the highways and other facilities of interstate commerce. The Court held that this conduct, if proven, would involve an "offense under the laws of the United States" since it constituted an interference with the constitutional right to travel. Plainly, the direct interference with the right to travel involved in *Guest* cannot be analogized to the facts of the instant case.

Far from constituting a direct obstruction on appellees' right to travel, § 3-203 merely fails to provide an encouragement to the exercise of that right. It cannot reasonably

be labeled an unconstitutional encroachment of the right to travel simply because it makes it more costly for appellees to make their homes in the District of Columbia than in the jurisdictions in which they formerly lived. If such were the case, the District would logically be required not only to abolish its residence requirement but, in addition, to upgrade its benefits to meet the standards of the most generous public assistance program elsewhere. Moreover, there are countless laws enacted by state legislatures which in an incidental way discourage the right to travel. Statutes imposing higher taxes than those imposed by sister states and statutes imposing stricter license requirements than those applicable elsewhere readily suggest themselves as examples. In short, the indirect effect which § 3-203 places on appellees' right to travel does not rise to constitutional proportions.

CONCLUSION

Since, as demonstrated, the residency requirement of § 3-203 is not repugnant to the Constitution of the United States, the decree of the court below is manifestly erroneous and should, therefore, be reversed.

Respectfully submitted,

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In the Supreme Court of the United States

October Term, 1968
No. 34

ROGER A. REYNOLDS, MAYER I. BLUM, HERBERT R. CAIN, JR., KATHERINE M. KALLICK, ROSALIE KLEIN, ALFRED J. LAUPHEIMER, EDWARD O'MALLEY, JR., NORMAN SILVERMAN, JULIA L. RUBEL, Constituting the Philadelphia County Board of Assistance, WILLIAM P. SAILER, Its Executive Director, MAX D. ROSENN, Secretary of the Department of Public Welfare of the Commonwealth of Pennsylvania, WILLIAM C. SENNETT, Attorney General of the Commonwealth of Pennsylvania,

Appellants

v.

JUANITA SMITH, Individually, and by Her, Her Minor Children, JOHN SMITH, TABITHA MILLER, SOPHIA PAYNTER, WILLIAM PAYNTER, VONCELL PAYNTER, and on Behalf of All Others Similarly Situated
and
JOSE FOSTER, Individually, and by Her, Her Minor Children JEANETTE FOSTER, ANNIE BEA FOSTER, WILLIAM FOSTER, FRANCES FOSTER,

Appellees

On Appeal from the United States District Court for the Eastern District of Pennsylvania.

BRIEF FOR APPELLANTS

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1967
No. 1138

ROGER A. REYNOLDS, MAYER I. BLUM, HERBERT R. CAIN, JR., KATHERINE M. KALLICK, ROSALIE KLEIN, ALFRED J. LAUPHEIMER, EDWARD O'MALLEY, JR., NORMAN SILVERMAN, JULIA L. RUBEL, constituting the Philadelphia County Board of Assistance, WILLIAM P. SAILER, Its Executive Director, MAX D. ROSENN, Secretary of the Department of Public Welfare of the Commonwealth of Pennsylvania, WILLIAM C. SENNETT, Attorney General of the Commonwealth of Pennsylvania,

Appellants

v.

JUANITA SMITH, individually, and by her, her minor children, JOHN SMITH, TABITHA MILLER, SOPHIA PAYNTER, WILLIAM PAYNTER, VONCELL PAYNTER, and on behalf of all others similarly situated

and

JOSE FOSTER, Individually, and by her, her minor children, JEANETTE FOSTER, ANNIE BEA FOSTER, WILLIAM FOSTER, FRANCIS FOSTER,

Appellees

On Appeal from the United States District Court for the Eastern District of Pennsylvania.

BRIEF FOR APPELLANTS

OPINION BELOW

The opinion of the United States District Court for the Eastern District of Pennsylvania which is the subject of this appeal is reported in 277 F. Supp 65.

JURISDICTION

The judgment of the Three Judge District Court in favor of appelles was entered on December 18, 1967. Appellants filed their Notice of Appeal on January 2, 1968. The appeal was docketed and Jurisdictional Statement filed on February 21, 1968. Probable jurisdiction was noted by this Honorable Court on March 4, 1968. Jurisdiction of this Court is invoked under Title 28 of the United States Code Section 1253 which provides for direct appeals from decisions of Three Judge District Courts.

STATUTES INVOLVED

The statute of the Commonwealth of Pennsylvania involved is Act No. 21 of the Pennsylvania Legislature, approved June 13, 1967, as follows:

Section 432:

(6) Assistance may be granted only to or in behalf of a person residing in Pennsylvania who:

(i) has resided therein for at last one year immediately preceding the date of application;

(ii) last resided in a state which, by law, regulation or reciprocal agreement with Pennsylvania, grants public assistance to or in behalf of a person who has resided in such state for less than one year.

QUESTION PRESENTED

Whether Section 432 (6) of the Pennsylvania "Public Welfare Code" which requires one year's residence as a qualification for eligibility for public assistances violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

Appellees are Juanita Smith, individually, and her minor children, John Smith, Tabitha Miller, Sophia Paynter, William Paynter and Voncell Paynter. Appellee Juanita Smith and other plaintiffs from the date of their birth and until December, 1966 resided in the State of Delaware. Since the second week of December 1966, appellees have all resided at 2859 Amber Street, Philadelphia, Pennsylvania.

On February 20, 1967, appellees made application for public assistance and received a grant of $115.00. A second grant in the same amount was received two weeks later on March 10, 1967.

On March 13, 1967, appellee Juanita Smith was informed by the County Board of Assistance that assistance to her and her children would be terminated. This action was taken because appellees did not satisfy the statutory requirement of one year's residence immediately preceding their application.

This suit was filed on March 31, 1967, to declare the Act of June 24, 1937, P. L. 2501, Section 8.1, as amended, and now contained in the Act No. 21 of the Pennsylvania Legislature approved June 13, 1967, Section 432 (6), unconstitutional and to preliminarily enjoin defendants from enforcing the said section and to make said injunction permanent after hearing. At the same time appellees moved to convene a three judge District Court under 28 U. S. C. Section 1915.

On March 31, 1967, the appellees were granted leave to proceed in forma pauperis and their motion for a temporary restraining order was denied.

Hearings were held on May 3, 1967 and May 29, 1967. Appellees' motion that the action be maintained as a class action was granted by District Judge Joseph S. Lord, III, on May 31, 1967.

The court made findings of facts and conclusions of law on June 13, 1967 and issued a preliminary injunction against the defendants as to Juanita Smith and her minor children.

On October 3, 1967, appellees' motion to extend the preliminary injunction to the class was denied.

On December 18, 1967, the court handed down its opinion declaring Section 432 (6) of the "Public Welfare Code", Act No. 21 of the Pennsylvania Legislature approved June 13, 1967, unconstitutional as a violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

ARGUMENT

I.

Introduction

In December, 1967, the court below[1], in a two to one decision[2], ruled unconstitutional a Pennsylvania Statutory provision[3] requiring residence in the Commonwealth for a period of one year as a qualification for public assistance.

On January 29, 1968, another Federal District Court in the Commonwealth[4], in a two to one decision[5], upheld the constitutionality of the same provision. *Waggoner v. Rosenn,* F. Supp.

The Pennsylvania District Court cases were preceded by three 1967, District Court decisions; *Thomp-*

---

[1] United States District Court for the Eastern District of Penna, Before: Harry E. Kalodner, Circuit Judge, and Michael H. Sheridan, and Joseph S. Lord, III, District Judges.

[2] Judge Kalodner, dissenting.

[3] Section 432 (6) of the Pennsylvania Public Welfare Code, Act of June 13, 1967, P. L. (Act No. 21), formerly Section 8.1 of the Public Assistance Law, the Act of June 24, 1937, as amended, P. L. 2051, Purdon's Statute Annotated, Section 2508.1.

[4] The United States District Court for the Middle District of Penna. Before: Harry E. Kalodner, Circuit Judge, and Michael H. Sheridan, Chief Judge, and Frederick V. Follmer, District Judge.

[5] Judge Sheridan, dissenting.

son v. Shapiro, 270 F. Supp. 331 (D. Conn.); *Green v. Department of Public Welfare*, 270 F. Supp. 173 (D. Del.); *Harrell v. Tobriner*, F. Supp. (D. D. C.), all ruling durational residence requirements to be unconstitutional.

Durational residence requirements for public assistance have been a traditional feature of public assistance programs since their inception in the 1930's. While the merits of such provision have been debated on a policy basis over the years, they have not been challenged on constitutional grounds[6] until recently[7].

Plaintiffs in the court below challenged the constitutionality of the durational residence requirement for public assistance on the grounds that it (1) infringed a constitutionally protected right of freedom of movement and (2) denied equal protection of the laws to newcomers as compared to settled residents of the state.

The court below based its decision solely on the ground that the challenged residence requirement constituted a violation of the Equal Protection Clause to the Fourteenth Amendment to the Constitution of the United States. The majority did not address

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[6] The impetus behind this line of attack may perhaps be attributable in part to special projects on law and social welfare of New York and Columbia Universities. See Harvith: "The Constitutionality of Residence Tests for General and Categorical Assistance Programs", 1966 Calif. L. Rev. 567, and in part to the establishment of Office of Economic Opportunity sponsored Community Legal Services Offices.

[7] An exception is the case of People ex rel Heydenreich v. Lyons, 374 Ill. 557, 30 N. E. 2d 46 (1940).

themselves to the plaintiffs' legal argument that the residence requirement involved an unconstitutional abridgment of freedom of movement, since they found, as a fact, that such provisions do not necessarily prevent interstate migration.

Smith v. Reynolds, 277 F. Supp. 65, at p. 66.

On this subject the dissenting opinion stated:

> "In my opinion that alternative claim is so specious and unfounded that it does not merit extended discussion...
>
> "The fact that the one-year eligibility requirement may operate to affect a decision to travel into Pennsylvania cannot by any stretch of the imagination be construed as a "statutory" bar to travel".
>
> *Smith v. Reynolds*, supra. at p. 72.[8]

Appellants in this brief will show (1) that the durational residence requirement does not violate the Equal Protection Clause and (2) that the court below committed error by misapplying the relevant criteria laid down by this court.

[8] Appellants in their brief to the court below presented the argument that the durational residence requirement does not involve an unconstitutional abridgment of freedom of movement and this Honorable Court is respectfully referred to that presentation in Addendum A, p. 23.

II.

The One-Year Residence Requirement Does Not Violate the Equal Protection Clause

The Equal Protection criteria applicable to determining the constitutional validity of statutory classifications have been defined by this Honorable Court in.

Railway Express Agency, Inc. v. New York, 336 U.S. 106;

Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522, and

Carrington v. Rash, 380 U.S. 69.

As stated in *McGowan v. Maryland,* 366 U.S. 420, at p. 425:

> "... the Fourteenth Amendment permits states a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The Constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the state's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."

Most recently this Honorable Court has said that the determination of the constitutionality of classifications in state legislation must be undertaken:

> ". . . In terms of its 'immediate objective' its 'ultimate impact' and its 'historical context' and the conditions existing prior to its enactment",
>
> *Reitman v. Mulkey,* 387 U.S. 369, at p. 373.

and that such legislation will be struck down only where "the State has significantly involved itself with invidious discrimination."

Reitman v. Mulkey, supra, at p. 380.

Accordingly, the issue in this case is whether a durational residence requirement for public assistance is capable of being construed as bearing a reasonable relation to a legitimate legislative purpose.[9]

The Pennsylvania "Public Welfare Code", Act of the Pennsylvania Legislature Approved June 13, 1967 (Act No. 21) states the legislative purpose in Section 401:

> "It is hereby declared to be the legislative intent to promote the welfare and happiness of all the people of the Commonwealth, by providing public assistance to all of its needy and distressed; that assistance shall be administered promptly and humanely with due regard for the preservation of family life, and without discrimination on account of race, religion or political affiliation; and that assistance shall be administered in such a way and manner as to encourage self-respect, self-dependency and the desire to be a good citizen and useful to society."

---

[9] This means that the state may not establish a classification promoting a purpose which patently offends values, affirmatively enshrined in the Constitution. *Loving v. Virginia* 368 U. S. 1.

This policy represents an attack on poverty with the help of annually appropriated tax funds. In order to determine whether any classification drawn by the statute can be reasonably related to the statutory purposes, it is essential to recognize that the stark reality of limited resources may make it impossible for the legislature to achieve the legislative goal completely. Surely, this does not mean that the legislature may not begin, may not make a reasonable allocation of the resources at hand to approach the objectives.

This Honorable Court has recognized this situation and has stated in *Railway Express Agency, Inc. v. New York,* supra, at p. 106:

> "It is no requirement of equal protection that all evils of the same genus be eradicated or none at all."

If the objective of providing a decent level of living to people between periods of productivity is valid, and there is not enough for all to go around, then the legislature must draw lines, must establish classifications. Eligibility conditions must be promulgated and grant levels set. Even if the process of budgeting and program development could be simplified to the point of dividing up the resources available to the program in grants among all potential recipients, the legislature must have a good idea, if not certain knowledge, of the number of recipients in the fiscal year. Economic indicators and information on birth and death rates may be sufficient to enable the legislature to plan and budget intelligently with respect to the population of Pennsylvania. But,

the legislature must be allowed to guard against the collapse of the program from unanticipated and uncontrollable events, however, unlikely. The one-year residence requirement can be explained and defended as such a predictive and "insurance" mechanism[10].

The legislature must surely be allowed great scope and leeway in its decision to promote the public assistance program.

McGowan v. Maryland, supra.

Suppose, for example, that the legislature determines that the resources presently available for the program are insufficient, in terms of existing eligibility standards, to provide grants at a level high enough to serve a constructive purpose for any recipient. Is the only alternative open to the legislature to raise financial eligibility standards? Appellants strongly content that there is nothing wrong or offensive, or so out of tune with contemporary standards of fairness, with the legislature insisting on some investment in the community as a condition of eligibility. If there is nothing wrong with such a concept, a one-year residence requirement is a perfectly legitimate, administratively feasible tool for the achievement of this objective. In this frame of reference, living in a community for one year can fairly be regarded as involving an investment. Apart from any payment of state and local taxes, persons who have lived in a community for a year have inevitable promoted the economy by channelling privately originated finances into the community's streams of commerce.

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[10] See Addendum A, p. 21.

Furthermore, the one-year residence requirement can be sustained as a reasonable administrative device for the prevention of fraud. The fact that recent arrivals in the Commonwealth, apparently financially eligible for assistance, are entitled to or in receipt of public assistance funds from another state would in many instances be established only after a considerable lapse of time.

Since restitution in such cases is obviously difficult or impossible, the prevention of such fraud is a legitimate objective and the residence test a reasonable device for achieving that objective.

Appellants find a compelling analogy in *Drueding v. Devlin*, 234 F. Supp. 721, aff. per curiam 380 U.S. 125[11] where this Court affirmed The Lower Court's Opinion that States may establish a one-year residence requirement for eligibility to vote in national elections. In that case the court based its decision on the underlying purposes of:

> (1) identifying the voter, and as a protection against fraud, and
>
> (2) to insure that the voter will become in fact a member of the community, and as such have a common interest in all matters pertaining to its government.

As pointed out above, the one-year residence requirement for Public Assistance serves similar purposes in that it prevents fraudulent receipt of duplicate benefits and requires an interest in the com-

[11] See also *Carrington v. Rash*, supra.

munity's financial position through contribution to the economy.

Public assistance has historically been a privilege or grant given by the state to needy persons, *Smith v. Reynolds*, supra, at p. 67.

The right to receive such assistance exists only by statutory authority and can be granted only within the conditions specified in the statute. The legislature in providing for public assistance may impose reasonable conditions upon the granting of such assistance. Since the Commonwealth of Pennsylvania has no obligation to make the state more attractive to nonresident indigents and, as set forth herein, there exist valid purposes to which the residence requirement is related, the constitutional validity of that condition must be upheld.

In brief, it is appellants' contention that where a statutory classification between persons does not patently offend values affirmatively enshrined in the Constitution (such as a discrimination on the basis of race, color, or religion), such classification may not be struck down unless it clearly bears no conceivable relation to promoting the statutory purpose. In the instant case, the appellants have shown that the one year residence requirement cannot be challenged as totally arbitrary and unrelated to the purposes of the public assistance program and that it does not, therefore, violate the Equal Protection Clause.

III.

The Lower Court Misapplied the Criteria of the Equal Protection Clause as Established by This Honorable Court

Under Section II, supra, at p. 11, appellants have referred to the criteria established by this court to test the validity of stautory classifications. The court below failed to apply these principles accurately. The whole tenor of the opinion hardly manifests any reluctance to strike down the challenged statutory provision. It bears little evidence of a thorough search for any state of facts that may reasonably be conceived to justify such provision. This point has been eloquently stressed in the dissenting opinion and in the court's opinion in *Waggoner v. Rosenn*, supra.

The court below states that its conclusion is supported by evidence which shows that the requirement of one year's residence as a condition to the receipt of public assistance has no logical basis and is wholly arbitrary in its application to needy residents of the Commonwealth. This claim is entirely unwarranted.

Defendants respectfully submit that all the evidence produced by plaintiffs is entirely without bearing on the constitutional problem to be resolved. The best demonstration of this is furnished by the court's own findings. The court found:

> "(1) The one-year residence requirement does not necessarily prevent migration to the State of

impoverished individuals, nor would the abolition of the requirement enhance the attractiveness of the Commonwealth to such persons. Thus, there would be no noticeable increase in the influx of newcomers, poor and otherwise, if the requirement was deleted.

"(2) Those persons who do come to Pennsylvania and find themselves in need of public assistance within the first year of their arrival do not, to any significant extent, emigrate to the State for the purpose of obtaining such aid. Although the fact that they may not at present obtain welfare benefits may tend to deter or discourage migration to the State, there is concededly no competent evidence that it does so in fact, nor is there evidence that newcomers, once arrived, depart once they discover their subordinate status. Those who come into the State (and later find themselves in need of public assistance) do so for reasons wholly unrelated to the incidental benefits of public welfare which might be available to them. In most instances, they come to accept or seek employment in the State, to rejoin or join family relations, or for health reasons. Seeking new opportunities or established contacts, they find themselves temporarily in need of public assistance; they apply for such help, and it is denied to them."

Smith v. Reynolds, supra, p. 66.

If the avowed purpose of the residence requirement was to discourage an influx of indigents to the Commonwealth, these findings would merely support

the conclusion that the residence requirement is an inefficient mechanism for accomplishing this purpose. It is hardly relevant to a determination of whether a classification between settled residents and new residents is constitutionally permissible.

The court's findings numbered (3) and (4), which relate to the insignificance of the cost in eliminating the residence requirement and the savings in administrative costs bear no relation to the question whether the challenged provision bears a reasonable relation to a legitimate statutory purpose. At best, such findings are attempts to second guess the wisdom of the legislature, which is a task not within the perogative of the court.

This court has recently stated in *Loving v. Virginia*, 388, U.S. 1, 87 S. Ct. 1817 at p. 1822:

> "In these cases, involving distinctions not drawn according to race, the court has merely asked whether there is any rational foundation for the discrimination, and has deferred to the wisdom of the state legislature."

And again, in *Flemming v. Nestor*, 363 U.S. 603, at page 611:

> "... it is not within our authority to determine whether the Congressional judgment expressed in that section is sound or equitable, or whether it comports well or ill with the purposes of the Act."

Finally, the court found:

> "(5) The Commonwealth can ascribe no purpose at all to the distinction made by the statute

between residents who have lived in the state for over one year and residents who have not . . ."

Smith v. Reynolds, supra. p. 67.

In fact, the Commonwealth presented the argument to the court below that the durational residence requirement fulfills the real and legitimate purpose of helping the legislature budget, on a yearly basis, sufficient funds to maintain and, if possible, to advance existing benefit levels within the limits of a predictable universe of recipients (see Addendum A, p. 21). The dissenting opinion and the majority opinion in *Waggoner v. Rosenn*, supra, recognized and accepted this proposition.

CONCLUSION

Appellants submit that the one year's residence requirement for public assistance promotes legitimate legislative purposes of Pennsylvania's public assistance program and does not violate any provisions of the United States Constitution.

Respectfully submitted,

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ADDENDA

(1) ADDENDUM A

DEFENDANTS' MEMORANDUM OF LAW

I.

INTRODUCTION

Plaintiffs challenge the constitutionality of Pennsylvania's durational residence requirements for public assistance on the grounds that they (1) infringe a constitutionally protected freedom of movement and (2) deny equal treatment to newcomers as compared to settled residents of the State.

Defendants' position is (1) that while there is a constitutionally protected right to free interstate travel, the residence requirements do not violate that right, and (2) to the extent that newcomers are treated differently from settled residents, this is justified by long-standing, well-established legitimate interests of the State.

Before analyzing plaintiffs' contentions, it is important to place the Pennsylvania public assistance program in context. It is thirty years old (Act of June 24, 1937, P.L. 2051, 62 P.S. Section 2501), and it

is conceded, even by plaintiffs, that there was no constitutional obligation on the Commonwealth to establish it and that there is not now a constitutional duty to maintain it. It did not when it was established, and it does not now pre-empt the field of assistance to the indigent. Rather, it operates together with other public and private welfare programs (see e.g., County Institution District Law, Act of June 24, 1937, P. L. 2017, 62 P.S. Section 2201, The County Code, Act of August 9, 1955, P. L. 323, Sections 2164, 2165, 2175, 16 P. S. Sections 2164, 2165, 2175, and The Administrative Code of 1929, Act of April 9, 1929, P. L. 177, Section 2310, 71 P.S. Section 600). This negates plaintiffs' implicit assumption that the public assistance program constitutes the only avenue of resources to indigent in-migrants.

The durational residence requirements, which have been a feature of the program since its inception, have not heretofore been constitutionally challenged in Pennsylvania. In fact, prior to this year, the one single direct challenge of such requirements anywhere in the United States was firmly rejected (*People ex rel. Heydenreich v. Lyons*, 374 Ill. 557, 30 N.E. 2d 46 (1940)).

II.

ARGUMENT

A. Pennsylvania's Durational Residence Requirements for Public Assistance Do Not Infringe a Constitutionally Protected Right to Freedom of Movement

Plaintiffs' memorandum of law is in large measure devoted to supporting the proposition that there is a constitutionally protected right of freedom of movement.

Defendants do not contest the existence of such a right, whether under the Commerce Clause[1] (as per the Court in *Edwards v. California,* 314 U.S. 160 (1941))[2], or as a privilege and immunity of national citizenship[3] (as per the concurring opinions in *Edwards,* supra), or pursuant to any other constitutional source (*United States v. Guest,* 383 U.S. 745 (1966)).

Plaintiffs then do not even attempt to prove, but cavalierly assume, that the durational residence requirements infringe the right to free interstate

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[1] U. S. Const. art. 1, Section 8, cl. 3.

[2] The Commerce Clause cannot aid plaintiffs in this context since there is clearly no State interference with Congressional power in view of the Congressional permission of a public assistance residence requirement up to one year (49 Stat. 627 (1935), as amended, 42 U.S.C. Section 602 (b) (2) (1964)).

[3] U. S. Const. amend. XIV, Section 1.

movement. The residence requirements do not bar entry to the State. Plaintiffs do not complain of being excluded from Pennsylvania. They are here and may stay here. What they want is a money grant[4]. The fallacy of plaintiffs' assumption that the residence requirements are equivalent to a direct statutory bar on access to the State (as e.g., in *Edwards*, supra), can be demonstrated in a number of ways:

(a) Plaintiffs assert (Memorandum, pp. 6-7) that the legislative purpose of the residence requirements was to discourage an influx of poor in-migrants. Plaintiffs adduce no direct evidence of such legislative intent, but merely infer it from the statutory provision. The inference is illegitimate, because the statute itself merely provides for the temporary withholding of public assistance benefits for one year from persons who have entered the State. The constitutionality of a statute may not be legitimately challenged merely in terms of an assumed legislative intent. In *Flemming v. Nestor*, 363 U.S. 603 (1960), the United States Supreme Court upheld a provision of the Social Security Act (Section 202(n), 49 Stat. 623 (1935), as amended, 42 U.S.C. Section 402(n) (1964)), terminating old-age benefits for aliens deported from the United States for having been members of the Communist party. To contentions that this provision evinced an unconstitutional legislative intent, Mr. Justice Harlan, for the Court, in part, responded (p. 617):

> "... only the clearest proof could suffice to establish the unconstitutionality of a statute on

[4] N.T. 58.

such a ground. Judicial inquiries into Congressional motives are at best a hazardous matter, and when that inquiry seeks to go behind objective manifestations it becomes a dubious affair indeed. Moreover, the presumption of constitutionality with which this enactment, like any other, comes to us forbids us lightly to choose that reading of the statute's setting which will invalidate it over that which will save it. . . ."

(b) In this context *any* nonaccess to public assistance funds would have to be regarded by plaintiffs as equivalent to a bar on entry to the State. But it is quite clear that the State is not under a duty to make any public assistance benefits available to anyone. How then can plaintiffs, in this context, complain of *any* non access to public assistance benefits?

(c) Plaintiffs contend, in effect, that any arguable disincentive to in-migration must be regarded as the equivalent to a direct bar on entry[5]. Assuming, for the moment, that potential in-migrants regulate their conduct in terms of a finely calibrated incentive-disincentive calculus, plaintiffs' argument here must rise to the preposterous heights that any State considered for in-migration must offer facilities and benefits at least equivalent to those of the State of present residence. Even in the public assistance context itself, for example, would not lower levels of benefits be as crucial a disincentive as the residence

[5] Plaintiffs have conceded, for example, that their position would be the same if the residence requirement were two weeks rather than one year (N. T. 60).

requirements in question? And in the context of residence requirements generally, are plaintiffs challenging the whole gamut of time-honored minimum contact requirements, such as residence requirements for voting, employment, occupational, professional and other purposes?

(d) In these days of sociological sophistication it is surely somewhat presumptuous of plaintiffs to ask the Court to rely entirely on their mere speculations as to the actual effect of residence requirements on patterns of migration. If no completed study was at hand[6] plaintiffs surely should have buttressed their contention with at least a limited study of their own. As it is, the only fact of record relevant in this context is that plaintiffs themselves certainly were not deterred from coming to Pennsylvania. Finally, even if speculation is to be considered, it is surely more reasonable to hazard the guess that public assistance benefits do not constitute a significant determinant of migration. People who are sufficiently motivated to uproot themselves and their families in search of a better life usually set their sites beyond the dole.

It is clear, therefore, that there is no basis whatever for equating the durational residence requirements for public assistance with provisions barring

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[6] Defendants know of only one such study—"A Study of Residence Requirements and Reciprocal Agreement in the Public Assistance Program in Pennsylvania"—a dissertation in Social Work, University of Pennsylvania, 1959, by Roland John Eugene Artigues, which concludes that the availability of public assistance benefits does *not* constitute a significant determinant of migration.

entry to the State. Accordingly, the residence requirements cannot fall under the proscriptions of State action barring entry to the State. Such proscriptions are obviously the corollary of the right to free interstate movement, whatever the constitutional sources of that right may be. For some reason, however, plaintiffs' memorandum contains a separate section charging that the residence requirement provision of the Pennsylvania Public Assistance Law unconstitutionally conditions public assistance on the surrender by plaintiffs of their liberty to travel (pp. 14-16). Since it has been shown above, that the residence requirements do not infringe upon the right to travel, it is, perhaps, sufficient to state that public assistance cannot be said to be "unconstitutionally Conditioned" on the surrender of the "liberty" to travel. However, defendants wish to comment briefly on the argument advanced by plaintiffs.

It is agreed that although Pennsylvania is under no duty to establish and maintain a public assistance program, if it chooses to do so it may not in the process impose unconstitutional conditions. For example, if Pennsylvania were to exclude from its program Negroes or members of certain religious denominations or people who had expressed certain political opinions, such exclusions would clearly be void as in derogation of clearly established constitutional rights. Plaintiffs' reference to *Sherbert v. Verner,* 374 U.S. 398 (1963), where unemployment compensation was withheld from a person who, for religious reasons, refused to return to a job which required Saturday work, and *Speiser v. Randall,* 357 U.S. 513 (1958), where a tax exemption was conditioned on an affirm-

ance of loyalty to the State government, merely illustrates this principle. Plaintiffs then cite *Kent v. Dulles*, 357 U.S. 116 (1958), *Aptheker v. United States*, 378 U.S. 500 (1964), and *United States v. Guest*, 383 U.S. 745, at 769-770 (1966), in an attempt to show that the right to travel is of the same order as First Amendment rights. However this may be, plaintiffs cannot overcome by this route, any more than by any other, the clear fact that residence requirements simply cannot be regarded as equivalent to a bar on entry to the State. The residence requirements do not infringe the right, or liberty to travel, by way of "unconstitutional conditions", or otherwise.

B. The Durational Residence Requirements for Public Assistance Do Not Deny Plaintiffs Equal Protection of the Laws

The test for ascertaining whether legislation meets the requirements of the equal protection clause[7] is "whether the classifications drawn in a statute are reasonable in light of its purpose" (*Carrington v. Rash,* 380 U.S. 89, 93 (1965), quoting *McLaughlin v. Florida,* 379 U.S. 1194, 191 (1964). In *Heydenreich,* supra, involving the only prior constitutional challenge of durational residence requirements for public assistance, the Supreme Court of Illinois stated:

> " . . . The constitutional guaranty of equal protection of the law is interposed against discriminations that are purely arbitrary. The Fourteenth Amendment does not purport to prevent a State from adjusting its legislation to differences in situation and to that end to make a justifiable classification. It merely requires that the classification shall be based on a real and substantial difference having a rational relation to the subject of the particular legislation. (citing cases) The classification need not, however, be accurate, scientific, logical or harmonious, so long as it is not arbitrary and will accomplish the legislative design. (citing cases) In particular, the classification of beneficiaries such as paupers, while not only permissible, but also necessary must none the less be reasonable . . . The judiciary will not interfere with such

[7] U. S. Const. amend. XIV, Section 1.

classification when made unless it is clearly unreasonable. (citing case)."

Plaintiffs contend that the classification effected by the durational residence requirements is unreasonable, because it must rest on one of two justifications: (1) the intended exclusion of indigent inmigrants, and (2) the intended prevention of abuse of the public assistance program by persons coming to Pennsylvania with no motive but to obtain assistance. The first purpose, plaintiffs argue, is clearly improper under *Edwards,* supra, and *Guest,* supra, and the second purpose, even if valid, does not support the reasonableness of the durational residence requirements because they sweep too broadly.

The fallacy of plaintiffs' argument is that they have simply ignored the clearly reasonable and legitimate bases for the durational residence requirements. The avowed purpose of the public assistance program, to render assistance to needy and distressed residents of Pennsylvania, immediately raises for the State Legislature the omnipresent and continuous problem of *a reasonable allocation of limited resources.* The program operates on the basis of yearly appropriations from State revenues, partially matched by the Federal government. While progress is being made, the benefit levels of the program are still below the minimum standards of health and decency. Year in, year out, the public program competes with other programs for the tax dollar and within the program the various categories of service tie with one another. Within the universe of the actual population of Pennsylvania the number of recipients fluctuates, of course, but within predictable limits.

Does it not follow then, that without attributing to the Legislature an intent to exclude indigent persons from migrating to Pennsylvania, there is a real and legitimate purpose to plan and budget, on a yearly basis, to maintain and, if possible, to advance existing benefit levels within the limits of a predictable universe of recipients? The residence requirements of the Public Assistance Law do not bar indigent persons from entering and remaining in Pennsylvania, they merely preclude for one year the participation of such persons in a limited benefit program.

If a residence requirement is to serve predictive purposes in terms of a universal population, the advantages of a specific durational test are clear and obvious. But a specific durational test also promotes other objectives. It greatly increases administrative feasibility. The advantage in this is not merely the increased convenience of the administrative personnel. Time and labor saved in administration effect a reduction in administrative costs and make more funds available for benefits. Moreover, where a program calls for the making available of benefits, it is often important that these benefits be made available promptly. It is also arguable that, in terms of the specificity of notice, a durational test is of advantage to potential applicants.

The actual duration of the period of residence required is not in issue in this case[8]. But the period of one year is clearly not unreasonable in view of its relationship to the yearly appropriation mechanism

[8] N. T. 60.

and also in light of the specific Congressional provision permitting, with respect to Aid to Needy Families with Children a one year residence requirement[9].

Accordingly, it is evident that the classification drawn by the durational residence requirements is eminently reasonable in light of the purpose of the Public Assistance Law, and plaintiffs are not denied equal protection of the laws.

III.

CONCLUSION

For the foregoing reasons, defendants request the Court to declare the Act of June 24, 1937, P.L. 2051, Section 8.1, added by the Act of August 26, 1965, P.L. 389, 62 P. S. Section 2508.1, as constitutional and to deny plaintiffs any relief.

Respectfully submitted,
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[9] 49 Stat. 627 (1935), as amended, 42 U.S.C. Section 602 (b) (2) (1964).

(2) ADDENDUM B

DEFENDANTS' SUPPLEMENTARY MEMORANDUM OF LAW

I.

INTRODUCTION

At the hearing of May 3, 1967, before this Court, plaintiffs filed a memorandum of law in support of plaintiffs' motion for preliminary injunction. Defendants then filed a memorandum of law on the merits and plaintiffs, in turn, filed a supplementary memorandum of law in support of plaintiffs' motion for a preliminary injunction and, after further hearing, a brief in support of plaintiffs' prayer for declaratory judgment and permanent injunction.

The purpose of this supplementary memorandum is to attempt to sharpen the focus on the issues before the Court in the light of plaintiffs' latest presentation.

II.

STATEMENT OF THE CASE

Plaintiffs' statement of the case is accurate[1] and is endorsed by the defendants.

[1] With the technical exception that the relevant statutory provision is now Section 432 (6) of the "Public Welfare' Code", the Act of June 13, 1967, P. L. (Act No. 21). For the sake of simplicity statutory references are to the law as it was at the time plaintiffs were denied benefits.

III.

STATEMENT OF FACTS

Plaintiffs' statement of the facts begins by referring to their prior memorandum of Law and their request for findings of fact on preliminary injunction, as presenting the particular facts relating to this case. In the opinion of the defendants, the facts relevant to the issue before the Court can be briefly and succinctly stated as follows: Plaintiffs were denied public assistance on the sole ground that they failed to comply with the one year's residence requirement imposed by Section 8.1 of the Pennsylvania Public Assistance Law, the Act of June 24, 1937, P.L. 2051, as amended, 62 P. S. Section 2508.1.

Plaintiffs' "Statement of the Facts" then proceeds with a combination of fact and argument which amounts to an eloquent plea for the elimination of durational residence requirements for public assistance. Such a plea should be addressed to the Legislature, not to this or any other Court. It is defendants' earnest plea to this Court, as a guardian of constitutional government, that the complex issues of policy involved in the establishment, change and maintenance of a public assistance system should be left in their broadest terms to the determination of the elected representatives of the people.

IV.

ARGUMENT

A. The One Year Residence Requirement Does Not Violate the Equal Protection Clause

In their first preliminary memorandum, plaintiffs contended that the classification effected by the durational residence requirement is unreasonable because it rests either on the intended exclusion of indigent in-migrants—an improper purpose under *Edwards v. California,* 314 U. S. 160 (1941) and *United States v. Guest,* 383 U.S. 745 (1966), or the intended prevention of abuse of the Public Assistance program by persons coming to Pennsylvania with no motive but to obtain assistance—a purpose which, even if valid, does not support the broad sweep of the classification.

Defendants, in their memorandum of law, pointed out that the residence requirement, like other limitations on a grant program, must be assessed against the background of the Legislature's function to make reasonable allocations of limited resources. This position was assailed in an amicus brief of the Health and Welfare Council, Inc. on the basis, in effect, that a one year residence requirement does not render the entire universe of public assistance recipients predictable. With this defendants will readily agree. However, our point was and remains that where a Legislature is faced with a problem of setting limits to a grant program, a residence qualification is one of

a number of obvious and traditional devices, one which unquestionably excludes a definite set of unknown potential recipients. To what extent a group of potential recipients can be estimated with accuracy is beside the point; in the matter of fiscal limitation and regulation the Legislature must surely be permitted to take out insurance against possibly inaccurate estimates by setting definitive boundaries to the program.

Plaintiffs' brief merely asserts that any minimum contact requirement is unreasonable and provides an illustration of a situation where one family is eligible and another is not. This merely serves to show one possible application of the law without in the slightest illuminating its reasonableness or unreasonableness.

Defendant's brief also stated that if a residence qualification is to serve as part of the program, a specific durational test promotes administrative feasibility. This was misunderstood by plaintiffs, as is evidenced by a footnote on page 12 of their brief. Defendants never stated that the public assistance program is easier to administer with a residence test, durational or otherwise, than without one. Our point is that if there is to be a residence requirement, a specific durational test is easier to apply than a test which depends on intent or other variables.

In the recent case of *Vivian Marie Thompson v. Bernard Shapiro, Commissioner of Welfare of the State of Connecticut*, United States District Court of Connecticut, Civil No. 11,821, the United States District Court ruled that State's durational residence requirement for public assistance unconstitutional, on

the basis of the equal protection clause, in view of the State's improper purpose of discouraging the in-migration of indigents. The Court makes no reference to any other, possibly reasonably purposes.

The dissent in that case expresses the view that the residence requirement is a reasonable one directly related to the problems sought to be governed. In support of this proposition, the dissent refers to the longstanding prevalence of such requirements in forty other states, the specific Congressional authority for such requirements and the statement that:

> "* * * It is a proper function of the legislature to enact such reasonable statutory controls, under the police powers reserved to the state in the Federal Constitution, that its obligations to aid the needy of the state may continue to be generously fulfilled. (Citation omitted)."

Over and above this, it is surely important to stress that residence requirements of one sort or another have been used as a time honored device to restrict certain specific benefits and advantages to those who have established a demonstrable bond, a nexus, with the community. What is unreasonable in a limitation of a tax-funded grant program that says, in effect, "We will help you, if you are needy, once you have lived with us for at least a year"?

If it is agreed that the Legislature does have some power to regulate and limit the public assistance program, in terms of residence, the only question that remains is whether one year is too long. Surely the Congressional authorization for a residence requirement up to one year endows the State's action in this

respect with at least prima facie reasonableness. When we take into consideration with this the relationship to yearly budgeting, the one year requirement must, we contend, be regarded as a reasonable minimum contact test for the purposes of the public assistance program.

In another effort to show the unreasonableness of the residence requirements, plaintiffs introduced testimony of estimates to the effect that the elimination of this requirement from the law would cost only some 1,600,000 State dollars a year and a slightly lesser amount in Federal matching dollars. This, plaintiffs contend, is an insignificant amount when considered along side the State's total public assistance of about $355,000,000. The estimated cost of repeal of the residence provision, indeed, amounts to a very small fraction of the amount budgeted for the total assistance program, but this is hardly a determinative measurement of the reasonableness of the residence requirement. In the first place defendants respectfully contend that the disposition of over one million tax dollars is always a matter of significance to the Legislature and the taxpayers, in absolute terms. Secondly, it must be remembered that throughout the thirty years of the existence of the public assistance program the Legislature has never appropriated sufficient funds to meet the requirements of the program in terms of minimum standards of health and decency. There is no evidence in the record that a cut back of $1,600,000 in one of the other phases of the program would not cause real hardship to some group of actual or potential recipients.

B. The Residence Requirement Does Not Abridge the Right to Freedom of Movement

Plaintiffs' argument, as originally presented in their memorandum of law and cursorily repeated in their brief is this: There is a constitutionally protected right to travel freely from state to state. Any statute which directly bars freedom of movement is, therefore, unconstitutional. Moreover, a state may not do indirectly what it may not do directly and, therefore, any State action that has the effect of discouraging free interstate movement is also unconstitutional. This is also the position taken by the Court in *Thompson v. Shapiro*, supra. As the Court there stated:

> "Because (the residence requirement law) has a chilling effect on the right to travel, it is unconstitutional".

Defendants' memorandum of law demonstrated the fallacy of this argument in some detail. Neither the Court in *Thompson v. Shapiro*, supra, nor plaintiffs in their brief come to grips with defendants' arguments in this respect.

Clearly, there is a constitutionally protected right to travel freely from state to state and to settle in any state. But the very existence of this right implies a choice to select for temporary sojourn or permanent settlement any of the States *as they are*—with their existing laws, institutions, facilities and programs. Plaintiffs' argument, logically applied, without stretching or extension, implies a constitutional duty

on States to take whatever action is necessary not to make the State unattractive for any potential group of visitors or in-migrants. This is clearly absurd. And, indeed, both the Court in *Thompson*, supra, and plaintiffs, concede, in the context of this case, that there is no affirmative duty on a State to establish or maintain a public assistance program. This concession is fatal to the argument that they propound. Whether the nonavailability of public assistance benefits to potential in-migrants is due to a durational residence requirement, or the nonexistence of a public assistance program, or any other reason, the effect on the potential in-migrants is equally chilling.

Nor does resort to *Sherbert v. Verner*, 374 U. S. 398 (1963), help plaintiffs in this respect. There the State, in the context of the unemployment compensation program, directly abridged plaintiff's right to the free exercise of her religion by ruling that Saturday work was suitable for her in spite of her beliefs. In this case defendants are neither challenging nor precluding the exercise of plaintiffs' right to travel or to settle in Pennsylvania. They are merely saying, "If you choose to settle in Pennsylvania you must take us as you find us. And at present we have a public assistance law with a reasonable one year residence requirement." That is all.

C. There is Adequate Justification for Pennsylvania's Residence Requirement

The plaintiffs' brief has a separate heading contending that there is no adequate State justification for the durational residence requirement. In fact, plaintiffs' argument under this heading are policy advocacy. Legally, this proposition is, of course, relevant to an assessment of the residence requirement in terms of the equal protection clause. The defendants' position is clearly expressed under that topic.

V.

CONCLUSION

For the foregoing reasons, the defendants request the Court to declare the Act of June 24, 1937, P. L. 2051, Section 8-1, added by the Act of August 26, 1965, P. L. 389, 62 P.S. Section 2508.1, now re-enacted as Section 432 of the "Public Welfare Code", the Act of June 13, 1967, P. L. ..... (Act No. 21), as constitutional and to deny plaintiffs any relief.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 813

BERNARD SHAPIRO, Welfare Commissioner of Connecticut,
Appellant,

vs.

VIVIAN THOMPSON,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF OF THE STATE OF IOWA AS AMICUS CURIAE ON BEHALF OF APPELLANT

INTEREST OF THE STATE OF IOWA

The Iowa Statute providing Aid to Dependent Children has an eligibility requirement of one year's residence in the state. Those persons, however, once eligible and receiving Aid to Dependent Children assistance, continue to receive assistance even after they have moved from the state for a period not to exceed one year.[1]

1. Appendix A.

The Iowa Statute authorizes the State Treasurer to accept federal funds appropriated "for expenditures upon authorization of the state board.[2] The State and Counties share equally in providing state matching funds for Aid to Dependent Children grants.[3]

The appropriations from the general fund of the State of Iowa are fixed-dollar amounts[4] and not "open-end" depending upon increased demands. Appropriations are set biannually by the General Assembly from projected budgets as required by statute. These are based upon past case load experience.

At the present time there is pending in the United States District Court for the Northern District of Iowa (Eastern Division) a case challenging the constitutionality of an Iowa Statute, which contains a residence requirement to qualify for Old-Age Assistance. In that case, *Mary L. Sheard* v. *Department of Social Welfare*[5] it is urged, as in the instant case, that the resident requirement violates the provisions of the Fourteenth Amendment of the Federal Constitution.

If, for no other reason, the residency law in Iowa is necessary in the long-range planning for legislative appropriations. It also assures those receiving Aid to Dependent Children assistance that they can expect that there will be no substantial decreases in their individual grants, since

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2. Currently, the funds are apportioned as follows: approximately 60 per cent from federal government to State Treasurer; approximately 20 per cent from State Treasury and 20 per cent from county appropriations.

3. Appendix B and C.

4. Appendix B.

5. *Mary L. Sheard, plaintiff* v. *Department of Social Welfare,* Civil Case No. 67-C-521-EC. Pre-trial conferences have been held; Ruling on Motion to Dismiss reserved until trial date (Probably May or June, 1968).

they are included in the calculations upon which the legislature based its appropriations.

The State of Iowa does not believe its statute to be unconstitutional and although its law differs somewhat, it joins with the State of Connecticut in its contention that its law does not offend the provisions of the Federal constitution.

ARGUMENT

This court has long recognized a distinction in an inherent or natural right, which is also sometimes referred to as a constitutional right, as distinguished from a statutory right created by the law-making body. This was pointed out in *Madden* v. *Commonwealth of Kentucky*,[6] in which we read:

> "The court has consistently refused to list completely the rights which are covered by the clause, though it has pointed out the type of rights, protected.[21]"

In the footnote 21, we read:

> "They have been described as 'privileges and immunities arising out of the nature and essential character of the national government and granted or secured by the constitution of the United States. *In re Kemmler*, 136 U.S. 436 . . ."

This court further said in that case:

> "We think it quite clear that the right to carry out an incident to a trade, business or calling . . . is not a privilege of national citizenship."

The reason the distinction thus made is important to note is the difference in the degree of discretion reposed in a

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6. *Madden* v. *Commonwealth of Kentucky et al.*, 60 S. Ct. 406, 410, 309 U.S. 83.

law-making body to provide certain classifications as to "statutory rights."

The humanitarian act of a state legislature enacting laws which provide financial assistance to residents who cannot earn sufficient wages by their labors within that community, creates a statutory right. It does not concern the natural or constitutional rights guaranteed by the Constitution nor is being a beneficiary under such law a privilege of national citizenship. Nor, does it take from those providing funds for welfare purposes, their property without due process of law.

When laws have been under attack as taking property without due process of law, this court has time and time again disposed of the matter by recognizing the wide discretion vested in the law-making branch of the government. "Whether the present expenditure serves a public purpose is a practical question addressed to the law-making department, and it would require a plain case of departure from every public purpose which could reasonably be conceived to justify the intervention of a court . . ." was the language used in the *Carmichael* v. *Southern Coal and Coke Co.*, case[7] and these words we read in *United States* v. *Realty Co.*:[8]

> ". . . claims founded upon equitable and moral considerations and grounded upon principles of right and justice, we think that generally such questions must in its nature be one for Congress to decide for itself. Its decision recognizing such a claim and appropriating money for its payment can rarely, if ever, be the subject of review by the judicial branch of the government."

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7. *Carmichael et al.* v. *Southern Coal & Coke Co.*, 57 S. Ct. 868, 875; 301 U.S. 495.

8. *United States* v. *Realty Co.*, 163 U.S. 427, 443.

In the *Green* v. *Frazier case*,[9] this court again pointed out that "questions of policy are not submitted to judicial determination, and the courts have no general authority of supervision over the exercise of discretion which under our system is reposed in the people or other departments of government." Repeatedly, this court has recognized the wide discretion of a law-making body concerning fiscal matters.

In the *Allied Stores of Ohio case*,[10] this court said:

> "The States have a very wide discretion in the laying of their taxes. When dealing with their proper domestic concerns, and not trenching upon the prerogatives of the National Government or violating the guaranties of the Federal Constitution, the States have the attribute of sovereign powers in devising their fiscal systems to ensure revenue and foster their local interest . . .
>
> ". . . if the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of dfference or policy, there is no denial of the equal protection of the law. (Citations)
>
> ". . . Similarly, it has long been settled that a classification, though discriminatory, is not arbitrary nor violative of the equal protection clause of the fourteenth amendment if any state of facts reasonably can be conceived that would sustain it. *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 78, 31 Sup. Ct. 337, 340 . . . (other citations)."

And as to classifications

> "grant government the right to select the differences upon which the classification shall be based, and they

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9. *Green et al.* v. *Frazier, Governor, et al.*, 40 S. Ct. 499, 502, 253 U.S. 233.

10. *Allied Stores of Ohio, Inc.* v. *Bowers*, 79 S. Ct. 437, 440, 358 U.S. 522.

need not be great or conspicuous. *Keeney* v. *New York*, 222 U.S. 536, 56 L. Ed. 305, 38 L.R.A. (N.S.) 1139, 32 Sup. Ct. Rep. 105. The state is not bound by any rigid equality. This is the rule; its limitation is that it must not be exercised in 'clear and hostile discriminations between particular persons and classes'."[11]

Again, this court in *Bell* v. *Commonwealth*[12] said:

> "We think that we are safe in saying that the fourteenth amendment was not intended to compel the states to adopt an iron rule of equal taxation."

The classification respecting beneficiaries of tax funds has also been before this court. In *Carmichael* v. *Southern Coal & Coke Co.*[13] we find these words:

> "This Court has long and consistently recognized that the public purposes of a state, for which it may raise funds by taxation, embrace expenditures for its general welfare (Citations) . . .
>
> ". . . What we have said as to the validity of the choice of the subjects of the tax is applicable in large measure to the choice of beneficiaries of the relief. In establishing a system of unemployment benefits the legislature is not bound to occupy the whole field. It may strike at the evil where it is most felt. (Citations)"

Courts have frequently advanced some theories as to the legislative intent although recognizing that the "special reasons, motives or policies" of the legislature for adopting the questioned law is not important nor are they required to make such inquiry.[14] Nevertheless, it has been said ". . .

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11. *Citizens' Telephone Company, Appt.* v. *Oramel B. Fuller, Auditor General of the State of Michigan*, 33 S. Ct. 833, 836, 229 U.S. 332.

12. *Bell's Gap R. Co.* v. *Commonwealth of Pennsylvania*, 10 S. Ct. 533, 535, 16 Atl. Rep. 593.

13. *Carmichael et al.* v. *Southern Coal & Coke Co.*, 57 S. Ct. 868, 875, 877, 301 U.S. 495.

14. *Southwestern Oil Co.* v. *State of Texas*, 126 S. Ct. 496, 500, 217 U.S. 114.

it may reasonably have been the purpose and the policy of the State Legislature, in adopting the proviso, to encourage the construction or leasing and operation of warehouses[15] . . ."; ". . . that the opportunity to secure and maintain homes would promote the general welfare[16] . . .". "We are not convinced the legislature might not fairly conclude this law in its practical operation will both benefit and encourage agriculture."[17] At page 418 we read:

> "At least there is room for argument that both agriculture and the reorganization of our school districts will be encouraged as contributions to the welfare of the state as a whole. At best the question is not beyond the zone of doubt in which the legislative determination is conclusive on the courts."[18]

It might here be appropriate to suggest that perhaps the Connecticut legislature had no evil intention in enacting this law. Perhaps the law as worded was to encourage a newcomer to join the labor market of the community with the assurance that, if after obtaining employment he for some reason is disappointed in his hopes to be gainfully employed, he may share in welfare programs. Such encouragement could not be said to be an undesirable goal and one which would promote the general welfare of the entire state.

It appears that there is at least sufficient doubt as to the legislative intent in inserting this proviso as to overcome the presumption long recognized by this court.

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15. *Allied Stores of Ohio, Inc.* v. *Bowers*, 79 S. Ct. 437, 442, 358 U.S. 522.

16. *Green* v. *Frazier*, 40 S. Ct. 499, 502, 253 U.S. 233.

17. *Dickinson* v. *Porter*, 35 N.W.2d 66, 240 Iowa 393, 409, Appeal dismissed 70 S. Ct. 88, 338 U.S. 843, 94 L. Ed. 515.

18. *Dickinson* v. *Porter*, 35 N.W.2d 66, 240 Iowa 393, 418, Appeal dismissed 70 S. Ct. 88, 338 U.S. 843, 94 L. Ed. 515.

This court in *Corporation Commission* v. *Lowe*[19] said:

> "It is to be presumed that the state in enforcing its local policies will conform its requirements to the federal guaranties. Doubts on this point are to be resolved in favor of, and not against, the state."

To say it another way as did Mr. Justice Douglas who delivered the opinion for the court in *Federal Housing Administration* v. *Darlington, Inc.*[20] quoting from the Sinking Fund cases[21]:

> " 'Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt.' "

This court in *Green* v. *Frazier*[22] further recognized the presumption in these words:

> "When the constituted authority of the state undertakes to exert the taxing power, and the question of the validity of its action is brought before this court, every presumption in its favor is indulged, and only clear and demonstrated usurpation of power will authorize judicial interference with legislative action.
>
> ". . . With the wisdom of such legislation, and the soundness of the economic policy involved we are not concerned. Whether it will result in ultimate good or harm it is not within our province to inquire."

And, again in the *Madden* case,[23] this court said:

> "The burden is on the one attacking the legislative arrangement to negative every conceivable basis which

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19. *Corporation Commission of Oklahoma et al.* v. *Lowe*, 50 S. Ct. 397, 399, 281 U.S. 431

20. *Federal Housing Administration* v. *Darlington, Inc.*, 79 S. Ct. 141, 358 U.S. 80.

21. *Sinking Fund cases*, 99 U.S. 700, 718, 25 L.Ed. 496.

22. *Green et al.* v. *Frazier*, 40 S. Ct. 499, 501, 502, 253 U.S. 233.

23. *Madden* v. *Commonwealth of Kentucky et al.*, 60 S. Ct. 406, 408, 309 U.S. 83.

might support it. *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 78, 79, 31 S. Ct. 337, 340, 55 L.Ed. 369, Ann. Cas. 1912C, 160."

As to the specific Aid to Dependent Children statutes of Iowa, it is obvious that there was no intention on the part of the legislature to discriminate against non-residents. This is demonstrated by the provisions of the statute which permit those who had been included within the projected budget for appropriations to continue to receive their grants if needed for as long as one year after they have moved from the State of Iowa.[24] One obvious reason for residency requirements in Iowa is necessary because the statutes require long-range planning for appropriations. Those already receiving assistance should be assured between legislative sessions that their Aid to Dependent Children grants will not be substantially reduced by an influx of new residents whose presence could not have been calculated. And, those who were included but moved can continue to receive their same grants. "The courts will assume that the legislative arm of the government considered the interests of the whole people in enacting a statute providing for a classification . . ."[25]

The lower court likens the Connecticut statute designating beneficiaries of Aid to Dependent Children grants to the California statute which prevented freedom of movement and held unconstitutional in the *Edwards* case.[26]

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24. Appendix A.

25. *Iowa Motor Vehicle Association et al.* v. *Board of Railroad Commissioners*, Decree affirmed per curiam 50 S. Ct. 151, 280 U.S. 529, Decision below 207 Iowa 461, 221 N.W. 364.

26. *Edwards* v. *California*, 314 U.S. 160.

It is difficult to see the relationship between the two laws. The welfare statute does not wall off the State of Connecticut from free ingress or egress of all citizens of the United States, whether they be rich, poor, potential Aid to Dependent Children recipients or otherwise. The freedom of movement right, which we all agree exists, and is a valued right incident to national citizenship, is one thing. And, a statute which creates a right to participate in welfare is another. For example, a mother who is receiving Aid to Dependent Children assistance in Iowa, when she moves to Connecticut, continues to receive the assistance until she qualifies for Aid to Dependent Children from Connecticut. She is not prohibited from moving into Connecticut because she is receiving Aid to Dependent Children assistance. Likewise, the Iowa Aid to Dependent Children statute, in classifying beneficiaries (which parallels the residency classification permitted in the Federal Act[27] providing matching funds), does not prohibit any citizen of the United States from taking up residency within its boundaries—whomever or for whatever purpose.

Respectfully submitted,

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February 27, 1968

27. 42 U.S.C. §602(b) (1959). See Appendix D.

APPENDIX

Pertinent Statutory Provisions and Regulations

A. 1966 Code of Iowa

Chapter 239 Aid to Dependent Children Assistance

239.2. "Assistance granted under this chapter to any needy child who: . . . Has resided in the state for one year immediately preceding the application for such assistance; or was born within the state within one year immediately preceding the application; if the mother has resided in the state for one year immediately preceding the birth of said child, without regard to the residence of the person or persons with whom said child is living."

239.8. 1966 Code of Iowa, *as amended by Senate File 551,*[1] *62nd General Assembly.* ". . . if the removal is out of state, assistance shall be continued as long as the child remains otherwise eligible for assistance under this chapter until he becomes eligible for assistance in the state to which he has moved, but in no case may assistance payments from this state be received for more than one (1) year. . ."

State Statutes Re: Appropriations for Aid to Dependent Children

8.23. "Biennial departmental estimates. On, or before, September 1, next prior to each biennial legislative session, all departments and establishments of the government shall transmit to the state comptroller . . . estimates of their expenditure requirements . . ."

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1. IOWA LEGISLATIVE SERVICE—Supplementing IOWA CODE ANNOTATED, 1967 Acts and Resolutions 62nd General Assembly, page 90. West Publishing Co., St. Paul, Minnesota.

B. State Appropriations for Years 1967-1968

H.F. 687, 62nd General Assembly

"An Act to appropriate from the general fund of the State of Iowa for the biennium beginning July 1, 1967 and ending June 30, 1969 . . .

For Aid to Dependent Children fund . . . . $7,035,000.00 . . ."

C. County's Share of Appropriations

239.11. 1966 Code of Iowa. "The county board of supervisors in each county in this state shall appropriate annually . . . such sums . . ."

D. Federal Social Security Act

Title 42, U.S.C.A., §602(b), State Plans for Aid to Dependent Children

"(b) The secretary shall approve any [state] plan which fulfills the conditions specified in subsection (a), except that he shall not approve any plan which imposes as a condition of eligibility for aid to dependent children, a residence requirement which denies aid with respect to any child residing in the State (1) who has resided in the State for one year immediately preceding the application for such aid, or (2) who was born within one year immediately preceding the application, if the parent or other relative with whom the child is living has resided in the State for one year immediately preceding the birth."

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STATEMENT OF INTEREST OF THE STATE OF DELAWARE.

The interest of the State of Delaware in the Appeal of the Welfare Commissioner of Connecticut in the instant case is the fact that Delaware by statute has imposed a one-year residency requirement on persons coming into the State as a prerequisite to eligibility for public assistance grants under, *inter alia,* the Old Age Assistance, Aid and Services to Needy Families with Children, Aid to the Disabled, and General Assistance programs. 31 *Del. C.* § 504.

The District Court for the District of Delaware, by Opinion issued June 28, 1967, and Order entered June 29, 1967, held the Delaware one-year residency requirement for public assistance invalid as in violation of the equal protection clause of the Fourteenth Amendment. *Green v. Department of Public Welfare,* 270 F. Supp. 173 (D. C. Del., 1967).

The Argument of the State of Delaware as Amicus Curiae in support of Appellant in the case at bar will be devoted to the constitutional grounds on which the Connecticut and Delaware District Courts invalidated, respectively, the Connecticut and Delaware one-year residency requirement for public assistance.

ARGUMENT.

I. A State's Residency Requirement for Public Assistance Is Not in Violation of the Privileges and Immunities Clause of the Fourteenth Amendment of the United States Constitution.

The privileges and immunities clause of the Fourteenth Amendment protects those interests growing out of the relationship between the citizen and the national government. *Slaughter-House Cases,* 16 Wall. 36 (1873); *Twining v.* New Jersey, 211 U. S. 78 (1908); *Hague v. C. I. O.,* 307 U. S. 496 (1939).

This Court has never held that receipt of public assistance from a State is a privilege of national citizenship.

Numerous State statutes which affect freedom of egress and ingress among the States have been specifically upheld by this Court as not in violation of the privileges and immunities clause of the Fourteenth Amendment. A few examples are typified in the following cases:

1. A statute taxing the business of hiring persons to labor outside the State. *Williams v. Fears,* 179 U. S. 270 (1900).

2. A statute restricting employment under public works of the State to citizens of the United States, with a preference to citizens of the State. *Heim v. McCall,* 239 U. S. 175 (1915); *Crane v. New York,* 239 U. S. 195 (1915).

3. A statute requiring persons coming into a State to make a declaration of intention to become citizens and residents thereof before being permitted to register as voters. *Pope v. Williams,* 193 U. S. 621 (1904).

See also *Drueding v. Devlin,* 234 F. Supp. 721 (D. C. Md., 1964), aff'd. *per curiam* 380 U. S. 125 (1965).

4. A statute taxing deposits in banks outside a State at rates higher than deposits in banks within the State. *Madden v. Kentucky,* 309 U. S. 83 (1940).

5. The right to become a candidate for State office is a privilege of State citizenship, not national citizenship. *Snowden v. Hughes,* 321 U. S. 1 (1944).

It is submitted that the right of interstate travel is impeded no more by a residency requirement for welfare eligibility than by the restrictions set forth in the statutes involved in the above cases.

II. A State's Residency Requirement for Public Assistance Is Not in Violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

The equal protection clause has been called the "usual last refuge of constitutional arguments." *Buck v. Bell,* 274 U. S. 200, 208 (1927). Few police regulations have been held unconstitutional on the ground that they deny equal protection of the laws, except where discrimination on the basis of race or nationality is shown.

In *Drueding v. Devlin,* 234 F. Supp. 721 (D. C. Md. 1964), aff'd. per curiam 380 U. S. 125 (1965), this Court affirmed the decision of the United States District Court for the District of Maryland, which had upheld the Maryland statute requiring one year's residency in the State for eligibility to vote in national elections against, *inter alia,* an equal protection argument. A person's right to vote is constitutionally no less important to the national or state welfare than the privilege of a person to receive the patrimony of a State's public assistance.

The Fourteenth Amendment permits States a wide scope of discretion in enacting laws which affect some groups of citizens differently from others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. *McGowan v. Maryland,* 366 U. S. 420 (1961).

The residency requirement for welfare eligibility of persons coming into a State is the basis of a reasonable classification directly related to achievement of the State's objective in imposing the requirement. The purposes of the classification resulting from a one-year residency requirement for welfare eligibility are similar to those stated by the Court of Appeals of Maryland and reiterated by the District Court in *Drueding v. Devlin, supra,* regarding the one-year residency requirement for voting, i.e., (1) identifying the voter and as a protection against fraud, and (2) to insure that the voter will become in fact a member of the community. The District Court in *Drueding,* affirmed per curiam by this Court, stated that although it was their personal opinion that one year was too long the court could not substitute its personal views for those of the Maryland Legislature in the absence of unreasonable discrimination.

III. In the Event This Court Finds Unconstitutional a State's Residency Requirement for Public Assistance, the Invalidity of a Residency Requirement Should Extend Only to Federal Funds Utilized for Public Assistance.

Even if this Court holds that a State's residency requirement for public assistance is invalid as in violation of the privileges and immunities clause or the equal protection clause of the Fourteenth Amendment or on some other constitutional ground, it is submitted that the Court should

limit such a decision by ruling that a residency requirement may not be applied to the extent that Federal funds are utilized by a State for public assistance grants under the Federal Social Security Act. 42 *U. S. C.* §§ 301 *et seq.* At a minimum, the Court should uphold the residency requirement to the extent that State funds are utilized for public assistance grants. See *Everson v. Board of Education*, 330 U. S. 1 (1947).

CONCLUSION.

It is respectfully submitted, for the reasons discussed above, that a State's one-year residency requirement for public assistance should be sustained, or in the alternative that the residency requirement should be sustained to the extent that State funds are utilized for public assistance grants.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 9

BERNARD SHAPIRO, WELFARE COMMISSIONER OF CONNECTICUT
Appellant

v.

VIVIAN THOMPSON
Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

AMICUS CURIAE BRIEF OF THE STATE OF TEXAS

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IN THE

SUPREME COURT OF THE UNITED STATES

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BERNARD SHAPIRO, WELFARE COMMISSIONER OF CONNECTICUT

Appellant

v.

VIVIAN THOMPSON

Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

AMICUS CURIAE BRIEF OF THE STATE OF TEXAS

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

NOW COMES the State of Texas in its sovereign capacity by Crawford C. Martin, its Attorney General, and files this amicus curiae brief pursuant to Subdivision 4 of Rule 42 of the Supreme Court Rules in support of the jurisdictional statement of Appellant, upon the condition that such appearance will not have the effect of making the State of Texas or any of its agencies parties to this litigation.

The interest of the State of Texas is revealed by the fact that Section 51a of Article III of the Constitution of Texas and the provisions of Article 695c, Vernon's Texas Civil Statutes, likewise contain residency requirements regarding the granting of public moneys to needy individuals. The validity of these residency

requirements is the subject matter in Civil Action No. 68-18-SA, styled *Alvarez, et al. v. Hackney, et al.*, currently pending in the United States District Court, Western District of Texas, San Antonio Division.

Section 51 of Article III of the Constitution of Texas in its original form as placed in the Constitution of 1876 prohibited the making of "any grant of public moneys to any individual, or association of individuals whatsoever." This prohibition is still retained in Section 51 of Article III of the Constitution of Texas. Section 51a of Article III of the Constitution of Texas was adopted as an exception to Section 51 rather than repealing the prohibition. In 1933 Section 51a of Article III of the Constitution of Texas was adopted which authorized the issuance and sale of bonds of the State of Texas not to exceed the sum of $20,000,000.00; "the proceeds of the sale of such bonds to be used in financing relief and work relief to needy and distressed people and in relieving the hardships resulting from unemployment, . . ." S.J.R. No. 30 of the 43rd Legislature, 1933. In 1935 the Constitution was again amended so as to authorize old age assistance to "actual bona fide citizens of Texas who are over the age of sixty-five (65) years, . . ." H.J.R. No. 19 of the 44th Legislature, 1935.

Various other amendments to Section 51a of Article III have been adopted so as to authorize the Legislature to grant public moneys to specified resident needy individuals. Section 51a of Article III of the Constitution of Texas at the present time provides:

> "Sec. 51a. The Legislature shall have the power, by General Laws, to provide, subject to limitations herein contained, and such other limitations,

restrictions and regulations as may by the Legislature be deemed expedient, for assistance to and/or medical care for, and for rehabilitation and any other services included in the Federal legislation providing matching funds to help such families and individuals attain or retain capability for independence or self-care, and for the payment of assistance to and/or medical care for, and for rehabilitation and other services for:

"(1) Needy aged persons who are citizens of the United States or noncitizens who shall have resided within the boundaries of the United States for at least twenty-five (25) years and are over the age of sixty-five (65) years;

"(2) Needy individuals who are citizens of the United States who shall have passed their eighteenth (18th) birthday but have not passed their sixty-fifth (65th) birthday and who are totally and permanently disabled by reason of a mental or physical handicap or a combination of physical and mental handicaps;

"(3) Needy blind persons who are citizens of the United States and who are over the age of eighteen (18) years;

"(4) Needy children who are citizens of the United States and who are under the age of twenty-one (21) years, and to the caretakers of such children.

"The Legislature may define the residence requirements, if any, for participation in these programs.

"The Legislature shall have authority to enact appropriate legislation which will enable the State of Texas to cooperate with the Government of the United States in providing assistance to and/or medical care on behalf of needy persons, and in providing rehabilitation and any other services

included in the Federal legislation providing matching funds to help such families and individuals attain or retain capability for independence or self-care, and to accept and expend funds from the Government of the United States for such purposes in accordance with the laws of the United States as they now are or as they may hereafter be amended, and to make appropriations out of State funds for such purposes; provided that the maximum amount paid out of State funds to or on behalf of any individual recipient shall not exceed the amount that it matchable out of Federal funds; provided that the total amount of such assistance payments and/or medical assistance payments out of State funds on behalf of such recipients shall not exceed the amount that is matchable out of Federal funds; provided that if the limitations and restrictions herein contained are found to be in conflict with the provisions of appropriate Federal statutes as they now are or as they may be amended, to the extent that Federal matching money is not available to the State for these purposes, then and in that event the Legislature is specifically authorized and empowered to prescribe such limitations and restrictions and enact such laws as may be necessary in order that such Federal matching money will be available for assistance and/or medical care for or on behalf of needy persons; and provided further that the total amount of money to be expended per fiscal year out of State funds for assistance payments only to recipients of Old Age Assistance, Aid to the Permanently and Totally Disabled, Aid to the Blind, and Aid to Families with Dependent Children shall never exceed Sixty Million Dollars ($60,000,000).

"Nothing in this Section shall be construed to amend, modify or repeal Section 31 of Article XVI of this Constitution; provided further, how-

ever, that such medical care, services or assistance shall also include the employment of objective or subjective means, without the use of drugs, for the purpose of ascertaining and measuring the powers of vision of the human eye, and fitting lenses or prisms to correct or remedy any defect or abnormal condition of vision. Nothing herein shall be construed to permit optometrists to treat the eyes for any defect whatsoever in any manner nor to administer nor to prescribe any drug or physical treatment whatsoever, unless such optometrist is a regularly licensed physician or surgeon under the Laws of this State." (Emphasis ours.)

While various other constitutional amendments have been adopted from time to time authorizing certain exceptions to the prohibition concerning grants of public moneys to individuals contained in Section 51 of Article III of the Constitution of Texas, we believe that the foregoing constitutional amendments are sufficient to show the method and pattern of providing public assistance to individuals by the State of Texas, and thus the interest of the State of Texas in this appeal.

We therefore adopt the jurisdictional statement of Appellant, the authorities cited therein, as well as the authorities cited in the dissenting opinion of this cause in the lower court. In addition thereto we call the Court's attention to Civil Action No. 9841, *Waggoner v. Rosenn,* in the United States District Court for the Middle District of Pennsylvania (not yet reported), wherein the court stated:

"The one-year residence requirement in the Connecticut, Delaware, Pennsylvania and District of Columbia acts has been ruled unconstitutional by three-judge District Courts in 1967: Thompson

v. Shapiro, 270 F.Supp. 331 (D. Conn.); Green v. Department of Public Welfare, 270 F.Supp. 173 (D. Del.); Smith v. Reynolds, —— F.Supp. —— (E.D.Pa.); Harrell v. Tobriner, —— F.Supp. —— (D.D.C.). The court was unanimous only in Green; dissenting opinions were filed in the other cases cited. It may be noted that the writer of this opinion dissented in Smith v. Reynolds, and that Chief Judge Sheridan, who is here dissenting, was a member of the majority in that case.

"We have taken into consideration the contrary views expressed in the foregoing cases. We can only say that the courts therein have substituted their judgment for that of the legislatures of forty states and the Congress of the United States as expressed in the enactment of the District of Columbia Public Assistance Act and Section 602(b), 42 U.S.C.A. of the Social Security Act, which, in providing for federal contributions to state-administered public assistance programs specified that states may establish a one-year residence eligibility requirement. We can only say that we regard the substitution of judicial judgment for that of legislative judgment as nothing less than judicial usurpation of the legislative function in disregard of the doctrine of separation of powers so firmly established since the founding of our Republic, and of the teaching of numerous decisions of the Supreme Court.

"There remains this, too, to be said, with respect to the plaintiffs' asserted claim that the one-year residence eligibility requirement is unconstitutional because it abridges their right of freedom to travel from one state to another in contravention of the interstate commerce clause of the Constitution, Article I, Section 8.

"In our opinion this claim is so specious and unfounded that it does not merit extended discus-

sion. It is only necessary to say that the Pennsylvania statute does not prohibit travel into the Commonwealth, as evidenced by the fact that the plaintiffs in the instant case were freely permitted entry. The fact that the one-year eligibility requirement may operate to affect a decision to travel into Pennsylvania cannot by any stretch of the imagination be construed as a 'statutory' bar to travel.

"For the reasons stated we hold that the one-year residence requirement as a condition of eligibility for public assistance grants to needy families, provided by Section 432(6) of the Pennsylvania Public Welfare Code, Act of June 13, 1967, is constitutional. The plaintiffs' complaint will be dismissed for failure to state a claim upon which relief can be granted."

Respectfully submitted,

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No. 813

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

BERNARD SHAPIRO, WELFARE COMMISSIONER OF THE STATE OF CONNECTICUT,

Appellant,

vs.

VIVIAN THOMPSON,

Appellee.

AMICUS CURIAE BRIEF OF THE STATE OF OHIO IN SUPPORT OF THE BRIEF OF BERNARD SHAPIRO, WELFARE COMMISSIONER OF THE STATE OF CONNECTICUT, APPELLANT

REASONS FOR ENTERING APPEAL AS AMICUS CURIAE

There is a somewhat similar action presently pending in the U. S. District Court for the Northern District of Ohio, Eastern Division. A final adjudication of the constitutional questions raised by the instant appeal could have an effect on several cases which have been or may be brought in the many states which have statutory residency requirements for welfare recipients similar to the one of the State of Connecticut, challenged herein, which statutes have been

promulgated by the state legislatures in accordance with the classification established by the Congress of the United States in Section 602(b), Title 42, U. S. C. A.

Although the Ohio statutes are not identical in language and application to that of Connecticut herein challenged, the statutes are similar in principle. Therefore, in order to preserve the right of a state legislature to determine the economic policies of the state and to define the responsibility of the state in providing assistance to the needy within the jurisdiction of the state, the State of Ohio enters this case as *amicus curiae* by authority of Rule 42, Paragraph 4 of the Rules of the Supreme Court of the United States, in support of the argument and position of Bernard Shapiro, Welfare Commissioner of Connecticut.

ARGUMENT

As ably set forth in the argument of the Appellant, there are many sound bases for critical review of the opinion of the United States District Court for the District of Connecticut. For purposes of emphasis, some of the basic objections are set forth in brief herein.

The Statutory Requirement As To Residency Is Neither An Arbitrary Nor An Unreasonable Classification.

The authority for a state legislature to enact a statute which requires that an applicant for assistance under an Aid for Dependent Children program shall meet a residency requirement of one year or less is expressly provided by the United States Code.

Section 602 b, Title 42, U.S.C.A. enacted in 1935 reads as follows:

"(b) The Secretary shall approve any plan which

fulfills the conditions specified in subsection (a) of this section, except that he shall not approve any plan which imposes as a condition of eligibility for aid to families with dependent children, a residence requirement which denies aid with respect to any child residing in the State (1) who has resided in the State for one year immediately preceding the application for such aid, or (2) who was born within one year immediately preceding the application, if the parent or other relative with whom the child is living has resided in the State for one year immediately preceding the birth."

It can therefore be seen that the original determination as to the propriety of the classification challenged herein was made by the Congress of the United States and not solely by the state legislature which enacted the statute in accordance therewith.

A Sovereign State May Not Be Sued Without Its Consent.

The damages awarded in the court below were in essence awarded against the State of Connecticut. It is well established in the jurisprudence of all civilized nations that the sovereign cannot be sued in its own courts or in any other court without its consent and permission. The right of individuals to sue a state in either a Federal or state court cannot be derived from the Constitution or laws of the United States, but can come only from the consent of the state.

Palmer v. *Ohio*, 248 U.S. 32, 63 L. ed. 108; 39 S. Ct. 16; *Beers* v. *Arkansas*, 20 How. 527; 15 L. ed. 991; *Memphis & C. R. Co.* v. *Tennessee*, 101 U. S. 337, 25 L. ed. 960; *Hans* v. *Louisiana*, 134 U. S. 1, 33 L. ed. 842, 10 Sup. Ct. Rep. 504.

There Is No Vested Right To Public Assistance.

There is no legal obligation at common law on any of the instrumentalities of government to furnish relief to the

indigent. The only obligation to support must result from some constitutional or statutory provision imposing a legal obligation. Therefore, when a state elects to furnish relief to its poor and needy, a large measure of discretion is vested in the legislature to determine what measures are necessary to promote the public welfare. Citation on next page.

People ex rel. Heydenreich v. *Lyons*, 374 Ill. 557, 30 N.E. 2d 46, 132 ALR 511.

It has been held that no indigent or class of indigents can acquire a vested right to be cared for by the public in any particular manner. Re Snyder, 93 Wash. 59, 160 P 12, 3 ALR 1230, aff. 248 U.S. 539, 63 L. ed. 410, 39 S. Ct. 67; *Magoun* v. *Illinois Trust & Sav. Bank*, 170 U.S. 283, 293, 42 L. ed. 1037, 1042, 18 Sup. Ct. Rep. 594; *Atchison, T. & S. F. R. Co.* v. *Matthews*, 174 U.S. 96, 103, 43 L. ed. 909, 912, 19 Sup. Ct. Rep. 609; *Clark* v. *Kansas City*, 176 U.S. 114, 119, 44 L. ed. 392, 397, 20 Sup. Ct. Rep. 284; *Lindsley v. Natural Carbonic Gas Co.* 220 U.S. 61, 78, 55 L. ed. 369, 377, 31 Sup. Ct. Rep. 337, Ann. Cas. 1912C, 160.

The Civil Rights Act Does Not Extend The Equitable Jurisdiction Of The Federal Courts.

It has been consistently held since the enactment of Section 1983, Title 42, U.S.C.A. that this act has created no new rights and has not extended the equity jurisdiction of the federal courts. It only secures rights, privileges and immunities secured by the Constitution and Federal Laws.

Kenney v. *Killian* 133 F. Supp 571 aff. 232 F2 288; *Stiltner* v. *Rhay*, C.A. Wash. 1963, 322 F 2d 314; *Giles* v. *Harris*, Ala. 1903, 23 S. Ct. 639, 189 U.S. 475, 47 L. ed. 909; *Progress Development Corp.* v. *Mitchell*, D.C. Ill 1960, 182 F. Supp 681, aff in part 286 F 2d 222.

The State of Ohio therefore adopts and joins in the argument of Bernard Shapiro, Welfare Commissioner of the State of Connecticut for the reversal of the opinion of the United States District Court for the District of Connecticut.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 813

BERNARD SHAPIRO, Welfare Commissioner of Connecticut,
Appellant,

vs.

VIVIAN THOMPSON,
Appellee.

On Appeal from the United States District Court for the District of Connecticut

Motion for Leave to File Brief as Amicus Curiae on Behalf of Appellee

INTEREST OF THE LEGAL AID SOCIETY OF ALAMEDA COUNTY

The Legal Aid Society of Alameda County is a non-profit California corporation established in 1929 by members of the State Bar for the purpose of furnishing legal services to those residents of Alameda County who are unable to afford the services of private attorneys. The

Legal Aid Society has a staff of attorneys with training and practical experience in the law most relevant to low-income persons, including welfare law.

Attorneys on the staff of the Society represent many clients who have been denied payments under the Aid to Families with Dependent Children (AFDC) program in California by the operation of the durational residence requirement contained in California Welfare and Institutions Code Section 11252. We have challenged the statute in administrative proceedings on the identical grounds as in the instant case, and we intend to pursue the claims of our clients further in order to vindicate their rights. The position of the State of California in opposition to our actions will be identical to the position it asserts before this Court.

The Legal Aid Society wishes to file an *amicus curiae* brief in this case for the purpose of answering the arguments of *amicus curiae* State of California in support of California's durational residence requirement.

ISSUES AND RELEVANCE

In reply to the brief of the State of California, the Legal Aid Society will argue that California's residence requirement statute violates the equal protection clause of the fourteenth amendment to the United States Constitution even if the purpose of the statue is to protect the state treasury or to provide budgetary predictability. We will further argue that the California statute violates the constitutionally protected right of interstate travel.

Discussion of these issues is relevant to the instant case because the California and Connecticut statutes, although different in some respects, are basically similar, and a decision of the Court on the constitutionality of the Connecticut statute may well determine the constitutionality of the California statute.

CONCLUSION

For the reasons stated above, the Legal Aid Society respectfully moves the court to permit the filing of a brief as *amicus curiae* on behalf of appellee.

Respectfully submitted,

LEGAL AID SOCIETY OF ALAMEDA COUNTY

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 813

BERNARD SHAPIRO, Welfare Commissioner of Connecticut,
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VIVIAN THOMPSON,
Appellee.

On Appeal from the United States District Court for the District of Connecticut

Brief of Amicus Curiae in Support of Appellee

INTEREST OF THE LEGAL AID SOCIETY OF ALAMEDA COUNTY

The interest of the Legal Aid Society of Alameda County in this litigation has been set forth under this same cover in the Motion for Leave to File Brief as Amicus Curiae.

SUMMARY OF ARGUMENT

This brief will argue first that in light of the express purpose of the AFDC program to provide assistance to the needy, the one year residence requirement imposed by Cali-

fornia Welfare and Institutions Code Section 11252 creates an arbitrary classification, proscribed by the equal protection clause of the fourteenth amendment. It is further argued that even if the validity of the residence requirement is to be judged in light of the specific purposes suggested by the State of California, without consideration of the fundamental purpose of AFDC legislation, the requirement is unconstitutional because it is not rationally related to the suggested purposes.

Finally, the brief will argue that the intent and effect of the AFDC residence test is to deter the migration of indigents across state lines into California, and that the statute is therefore invalid on the additional ground that it violates the constitutionally protected right of interstate travel.

ARGUMENT

I. California's One Year AFDC Residence Requirement Has No Reasonable Relation to the Purpose of AFDC Legislation and Thus Constitutes a Denial of Equal Protection

In defense of its AFDC durational residence requirement contained in Welfare and Institutions Code Section 11252, the State of California asserts that the purpose of the statute is not the commonly stated, historical purpose of residence requirements—to place an economic barrier in the path of poor persons who wish to move to a particular state[1]—but rather to conserve public resources by limiting the number of persons eligible for AFDC in California and to enable the State to make a reliable, annual budget forecast of the number of persons who will be eligible for AFDC in a particular year. The State, however, has failed to consider the vital and primary purpose of AFDC legislation—to sustain members of the community who are in need. Cali-

1. See, *e.g.*, *People v. Lyons*, 374 Ill. 557, 30 N.E.2d 46, 51 (1940); *Edwards v. California*, 314 U.S. 160, 174 (1941).

fornia's AFDC residence requirement fails to meet the constitutional standard of equal protection because the classification it creates is arbitrary in light of this basic purpose.

The purpose of the State's AFDC program is set forth in a series of statutes beginning with Welfare and Institutions Code Section 10000, which states the general purpose of California welfare legislation:

> The purpose of this division [Division 9, entitled "Public Social Services" and including all AFDC legislation] is to provide for protection, care, and assistance to the people of the state in need thereof, and to promote the welfare and happiness of all of the people of the state by providing appropriate aid and services *to all of its needy and distressed.* It is the legislative intent that aid shall be administered and services provided prompty and humanely, with due regard for the preservation of family life, and without discrimination on account of race, national origin or ancestry, religion, or political affiliation; and that aid shall be so administered and services so provided as to encourage self-respect, self-reliance, and the desire to be a good citizen, useful to society. (Emphasis added)

Welfare and Institutions Code Section 10001, the statute immediately following, provides in part:

> The purposes of the public social services for which state grants-in-aid are made to counties are:
>
> (a) To provide on behalf of the general public, and within the limits of public resources, reasonable support and maintenance for needy and dependent families and persons.

The specific purpose of the AFDC program is set forth subsequently in Welfare and Institutions Code Section 11205:

> It is the object and purpose of this chapter [entitled "Aid to Families with Dependent Children"] to provide aid for children whose dependency is caused by circumstances defined in Sections 11250 and 11251

> [defining deprivation of parental support or care], to keep children in their own homes wherever possible, and to provide the best substitute for their own homes for those children who must be given foster care.
>
> Those engaged in the administration of aid under this chapter are responsible to the community for its effective, humane, and economical administration.
>
> It is the intent of the Legislature that the employment and self-maintenance of parents of needy children be encouraged to the maximum extent and that this chapter shall be administered in such a way that needy children and their parents will be encouraged and inspired to assist in their own maintenance. The department shall take all steps necessary to implement this section.

The emphasis is overwhelmingly upon the provision of aid to the needy people of the state, rather than upon the preservation of public funds. Indeed, the reference in Section 10001 to the "limits of public resources" is no basis at all for inferring that the purpose of the program set up by the legislature is to save money; it is merely a direction to the administrator to operate within his budget in accomplishing the desired social objective. The State of California, emphasizing this one phrase in Section 10001, has lost sight of the fundamental purpose of AFDC—to insure the survival and encourage the self-maintenance of the poor.[2]

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2. The State has also misconstrued the purpose of AFDC by emphasizing the "safeguarding of public funds", a phrase from the introductory sentence of Section 11004. That section in full deals with the conditions and methods for the collection from welfare recipients of prior overpayments; it should not be construed as the purpose by which the constitutionality of the residence requirement is to be determined.

In addition, the State has apparently overlooked Section 11205, quoted *supra*, pp. 6-7, which clearly states the purpose of the AFDC chapter and contains no reference to conserving public resources.

The State has apparently lost sight of the logic of the matter as well. On page 8 of its *amicus curiae* brief the following statements are made:

> There is no requirement in the Constitution that mandates a state to afford relief to all or any of its needy residents regardless of the period of their residence. That this succor is socially desirable few would deny. That California has an obligation to supply unpolluted air and water, adequate schools, highways, hospitals, protective services to all of its citizens none would deny. But it does not follow that the non-discriminatory residence requirements of California law amount to an unreasonable classification within the meaning of the Equal Protection Clause.

But of course it does follow. The "socially desirable succor" to which the State alludes is the very survival of a significant number of people in our society. A family deprived of minimal food, clothing and shelter finds it difficult to take advantage of less essential services provided by the state. The fundamental nature of the legislation involved in this case[3] is not to be obscured by vague references to fiscal and budgetary convenience. As a federal court has recently stated in a case considering the constitutionality of welfare residence laws:

> This national movement toward assistance where assistance is needed, and the human terms of the problem, permit the court somewhat greater latitude in deciding

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3. The essential nature of the payments provided under welfare categorical aid programs distinguishes the residence requirement cases from *Flemming v. Nestor*, 363 U.S. 603, 611 (1960), which upheld an allegedly arbitrary termination of old-age insurance benefits under the Social Security Act. For a discussion of other distinctions between *Flemming* and the residence cases, see Harvith, the Constitutionality of Residence Tests for General and Categorical Assistance Programs, 54 Calif. L. Rev. 567, 575-579 (1966).

> that this difference in the treatment of those in our midst who are in need amounts to unequal protection of the laws than if the treatment were with respect to some matter less critical to their living conditions. *Harrell v. Tobriner,* Civil Action 1497-67 (D.D. Col. 1967), at pp. 21-22.

In fact, it may well be that the Constitution does mandate a right of survival as a condition precedent to the enjoyment of the other basic rights it establishes.

In light of this fundamental purpose of AFDC legislation—to sustain members of the community who are in need—a statute which arbitrarily singles out a certain class of the needy for total exclusion denies to that class the equal protection of the laws and thereby contravenes the fourteenth amendment to the Constitution.

Even if it were to be assumed that conservation of public resources and budgetary predictability, in and of themselves, are valid and properly conceived purposes for welfare legislation, a classification which excludes persons who have recently arrived in California has no rational relationship to either of those purposes and is therefore constitutionally impermissible. In an attempt to conserve AFDC funds, California can no more justify the exclusion of residents who have not lived in California for one year than it could justify the exclusion of residents whose surnames begin with a particular letter of the alphabet. The State argues that it has a rational basis for excluding recently arrived residents because it makes possible the prediction of the number of persons who will be eligible for AFDC each year and thereby facilitates the planning of yearly budgets. Whether the State is contending that the need for budgetary predictability justifies the classification as a method of saving money or that budgetary pre-

dictability is an adequate justification of the residence requirement independent of the conservation of public funds, the premise of either argument fails because there is no basis for the assertion that the residence requirement furthers predictability. No connection is apparent, and the State has said nothing to enlighten us on this point.[4] Welfare statutes contain complex eligibility requirements, of which residence is only one, and it seems very doubtful that changing this one requirement would make any significant difference in the State's ability to plan its budget. Several states, including New York, have no residence requirements, and they seem to be able to forecast their yearly expenses reasonably well. California itself has no residence requirement for assistance under the Aid to the Blind program (see Welfare and Institutions Code Section 12550) and has been able to plan adequately.

This Court has already held that where the purpose of a statute is to conserve public funds, the statute may not discriminate arbitrarily in achieving that purpose. In *Rinaldi v. Yeager*, 384 U.S. 305 (1966), a county attempted to obtain reimbursement from a prisoner's earnings for the transcript furnished to him in connection with his unsuccessful *in forma pauperis* appeal. The state statute requiring repayment did not, however, apply to unsuccessful appellants who received a fine, a suspended sentence, or who had been placed on probation; it applied only to unsuccessful appellants confined in institutions. The Court made the assumption that the legislature could validly provide for replenishing a county treasure from the pockets of those who had

4. In light of its assertion that the residence test does not deter migration of the poor, the State could not be arguing here that the abolition of the residence test would upset budgetary predictability because of a sudden insurge of indigents.

directly benefited from county expenditures, but held that appellant had been denied the equal protection of the laws because there was no rationality in the nature of the class singled out by the statute. The differences between the class required to repay and those not so required were unrelated to the fiscal objective of the statute and were only minimally related to any administrative convenience. The classification created by the California AFDC requirement is likewise unrelated to any fiscal objective and unjustified by administrative (budgetary) convenience; in fact it is considerably more invidious than the classification in *Rinaldi* because poor persons who have recently arrived in California have needs which are not merely equal to, but greater than those of poor persons who have lived in the state for over a year.[5]

Moreover, it is highly questionable whether the AFDC residence requirement accomplishes its proclaimed purpose of preserving state finances. The immediate, apparent saving is quite small. In New York in 1955 about two percent of the total public assistance caseload were persons who had not resided in the state a full year.[6] As the court points out and documents in *Harrell v. Tobriner,* Civil Action No. 1497-67 (D.D.Col. 1967) at pp. 12-13, 19, the administrative expenses of investigating cases and enforcing residence laws and the long term social costs of family separation, malnutrition, and juvenile crime are probably much greater than the apparent saving.

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5. Examples of such needs are rental and utility deposits. Furthermore it takes some time for a newly arrived family to acquaint itself with the most economical methods of shopping for food, clothing, and other items.

6. Kasius, What Happens in a State Without Residence Requirements, in Residence Laws: Road Block to Human Welfare 18, 19-20 (National Travelers Aid Association 1956).

Thus the classification created by the statute is arbitrary even in light of the purposes suggested by the State.

II. California's One Year AFDC Residence Requirement Violates the Constitutionally Protected Right of Interstate Travel

The State of California apparently acknowledges that a state statute which does not directly foreclose a citizen's right of interstate travel, but still discourages, burdens, or has a chilling effect upon the exercise of that right may violate the Constitution. The State argues, however, that its AFDC durational residence requirement is not proscribed by the Constitution because it is neither the purpose nor the effect of the statute to discourage migration of indigents to California.

The most commonly stated and accepted purpose of state welfare residence requirements is either to limit the migration of all needy persons or, in the candid words of the Supreme Court of Illinois, to prevent the state from becoming "a haven of the transient poor seeking the most advantageous statutory provisions granted those requiring assistance."[7] The State of Connecticut has acknowledged such a purpose in the instant case. The State of Delaware and the District of Columbia have frankly done the same.[8] Commentators are in agreement as the purpose of these statutes.[9] Historical analysis, going back to the Elizabethan

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7. *People v. Lyons*, 374 Ill. 557, 30 N.E.2d 46, 51 (1940).

8. See *Green v. Department of Public Welfare*, Civil Action No. 3349 (D. Del. 1967); *Harrell v. Tobriner*, Civil Action No. 1497-67 (D.D. Col. 1967).

9. See, *e.g.*, Wickenden, Let's Face Up to Restrictive Residence Laws, in Residence Laws: Road Block to Human Welfare 5, 6 (National Travelers Aid Association 1956); Harvith, the Constitutionality of Residence Tests for General and Categorical Assistance Programs, 54 Calif. L. Rev. 567, 615 (1966).

Poor Law, indicates that the purpose of welfare residence or settlement laws is to "seal off" poverty in a particular locality.[10] Yet the State of California now asserts without any documentation,[11] that its AFDC residence test is by no means intended to keep the poor out of California. California legislators appear to be of a different view. The Report of the Senate Fact Finding Committee on Labor and Welfare of 1961 entitled "Aid to Needy Children" (the former designation of the AFDC program) states at p. 107:

> The committee recommends that no action be taken at this time by the legislature to eliminate existing State residence requirements. Again, there are no reliable cost estimates available and, furthermore, the high standard of aid paid relative to that of other states would undoubtedly result in some influx of persons seeking such assistance. Additionally, the subject of State eligibility requirements has been recommended for study by the United States Department of Health, Education, and Welfare. This is a promising undertaking because the federal government could do much to equalize ADC aid payments among various states,

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10. See the discussion in the majority opinion in *Edwards v. California*, 314 U.S. 160, 174 (1941); tenBroek, California's Dual System of Family Law: Its Origin, Development, and Present Status, 16 Stan. L. Rev. 257, 264-265, 900 (1964), 17 Stan. L. Rev. 614 (1965).

11. The only indications of legislative purpose upon which California relies are phrases in Welfare and Institutions Code Sections 10001(a) and 11004 which refer to the conservation of public funds. Section 10001(a) is part of the general "purpose" provisions for all of California's categorical aid programs, and Section 11004 deals with the collection of overpayments; neither section purports to state the purpose of the challenged residence requirement found in Section 11252. And, as discussed on p. 7, *supra*, references to public resources are merely directions to the administrator of the program, not statements of purpose. Finally, the phrases referring to the conservation of funds are entirely inconclusive on the question of whether the purpose of the residence test is to save money by excluding an arbitrary category of residents or to save money by discouraging the poor from entering California.

and thereby enable them to consider elimination of residence requirements.

In light of this evidence and in light of the flimsiness of the alternative purposes suggested by the State of California and discussed earlier in this brief, it must be concluded that the primary purpose of California's AFDC residence requirement is to deter the migration of indigents.

Furthermore, the natural and likely effects of California's AFDC residence requirement are to prevent the migration of some needy persons who would otherwise come to California and to put considerable economic pressure on those who actually arrive in the State, thus forestalling the exercise of the right of interstate travel in some instances and burdening the exercise of that right in other instances. The Court has not required proof of the effects of a statute on the exercise of constitutionally protected freedoms when the likely effect of a challenged statute is apparent. In *Baggett v. Bullett*, 377 U.S. 360, 372-374 (1964), the Court reasoned that the likely effect of requiring state teachers to take a vague loyalty oath as a condition precedent to employment would be to cause them to "steer far wider of the unlawful zone [of speech] . . . than if the boundaries of the forbidden areas were clearly marked." And in *Sherbert v. Verner*, 374 U.S. 398, 403-404 (1963), it was held that the disqualification of a Seventh-day Adventist from unemployment compensation benefits because of her refusal to accept work on Saturday, the Sabbath Day of her faith, imposed a burden upon the free exercise of her religion. Although there was no criminal sanction directly compelling her to work a six-day week, the Court regarded as equivalent the indirect pressure brought to bear against her by compelling a choice between her religion and the benefits. Similarly, while the plaintiffs in residence require-

ment cases in current litigation were not actually prevented from migrating, they are subject to constant economic pressure to forego their right to set up residence in the state of their choice and return to the state from which they came.[12]

When a statute's intended, chilling effect upon a constitutional right is apparent, as here, the burden shifts to the state to demonstrate that the statute does not in fact have the effect imputed to it. The State of California, apparently recognizing this burden, has attempted to demonstate that its residence requirement does not have any proscribed effect on the right to travel by quoting statistics which indicate that over one million persons migrated to the state between 1955 and 1960 and that there has been a 25 percent increase in California's population since 1960. (*Amicus* brief, p. 9) Neither figure demonstrates anything concerning the number of *needy* persons who have come to California in recent years or, more significantly, the number who have been prevented from coming. Moreover, California has not even attempted to show that the residence requirement does not have a burdensome effect upon poor people once they arrive in the State. The State has not

12. The provisions of California's County Aid and Relief to Indigents (commonly referred to as General Assistance) further reinforce the pressure upon indigent migrants to return to their state of origin. The State requires each county to support its poor residents who are unable to qualify for categorical assistance (*e.g.*, AFDC), but imposes a three year state residence requirement on such support. The State permits the counties to give "nonresident" indigents emergency relief and to pay the expenses necessary to transport them to another state when possible. California Welfare and Institutions Code Secs. 17000, 17003, 17004, 17100-17104. Usually, the only emergency relief granted by counties to indigents who do not meet the General Assistance three year residence requirement is contingent upon the indigent's promise to return to the state from which he came. See, *e.g.*, General Assistance Policies and Procedures Manual of the Alameda County Welfare Department 9-13 (1962).

and cannot overcome the logical inference of the effect of its residence test.

Thus the purpose and the effect of California's AFDC residence requirement is to prevent and discourage poor persons from traveling to California and taking up residence, and the requirement is invalid under the Constitution.

CONCLUSION

The California AFDC residence requirement has no more claim to consitutional validity than the Connecticut AFDC residence requirement. In determining validity under the equal protection clause, both statutes must be viewed in light of the fundamental purpose of AFDC legislation. Even if judged in light of intended fiscal savings and administrative convenience, they are still arbitrary. The real legislative intent and effect of these statutes, however, is to discourage indigents from coming to the state. Therefore, both the California and the Connecticut residence requirement violate the constitutional right of interstate travel as well as the right to the equal protection of the laws.

Respectfully submitted,

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1968

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No. 33

WALTER E. WASHINGTON, et al.,
Appellants,

vs.

MINNIE HARRELL, et al.,
Appellees.

On Appeal from the United States District Court
for the District of Columbia

BRIEF OF THE NATIONAL FEDERATION OF THE BLIND AS AMICUS CURIAE IN SUPPORT OF APPELLEES

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1967

No. 1134

WALTER E. WASHINGTON, et al.,
Appellants,

vs.

MINNIE HARRELL, et al.,
Appellees.

On Appeal from the United States District Court for the District of Columbia

BRIEF OF THE NATIONAL FEDERATION OF THE BLIND AS AMICUS CURIAE IN SUPPORT OF APPELLEES

INTEREST OF THE NATIONAL FEDERATION OF THE BLIND

The National Federation of the Blind, as its name indicates, is a country-wide organization whose members (with relatively few exceptions) are legally blind persons, as are its officers and leaders. The membership totals many thousands, a large number of whom are recipients of public assistance in various states.

Since its inception, and in pursuit of the goals leading to its creation, N.F.B. has dedicated much voluntary time and effort, and all the money it could muster, to gain for the blind a full and equal footing in society and to end the negative attitudes and practices which have kept so many of them locked in poverty and dependence over the centuries. In these efforts, although by no means of exclusive concern, the reform of welfare legislation in respects important to the blind as well as others has ranked high. We believe N.F.B. is entitled to share in the credit for a number of forward steps in that field. The organization was fortunate to have as its founder and its president over many years Professor Jacobus tenBroek, whose accomplishments included the chairmanship of the State Social Welfare Board of California and whose work and writings in the social welfare and legal fields earned him wide and just acclaim. His untimely death a few weeks ago marks a sad loss not only for N.F.B. and the blind but for the whole country, particularly the unfortunate and the poor.

N.F.B. has long been an opponent of durational residence requirements in welfare legislation, convinced that they are both unwise and unconstitutional. Dr. tenBroek was one of their leading critics in his writing. (See, e.g., tenBroek and Matson, *The Disabled and the Law of Welfare,* 54 Cal. L. Rev. 809, 824-828 (1966).)

Because of N.F.B.'s long-standing interest in the problem before the Court, we requested consent to file an amicus curiae brief in support of appellees in

this case, and the consent was graciously given by both sides. Our observations and arguments will not be limited to the concerns of the blind alone but of recipients of assistance generally, and, naturally, the Pennsylvania and Connecticut cases now pending before the Court on the same subject are of no less interest to us than the present one. We hope that this brief will contribute to the final condemnation of provisions which have marred and frustrated our social welfare system for far too long.

ARGUMENT

I. BOTH THE EFFECT AND THE PURPOSE OF CHALLENGED LEGISLATION MUST BE CONSIDERED IN ASSESSING ITS CONSTITUTIONALITY.

At the risk of rehearsing the rudimentary, we think it particularly appropriate in this field to stress at the outset that the constitutional infirmity of legislation may arise from its effect or its purpose or both. There is a danger of losing sight of this elementary but important point in deference to the more provocative inquiry as to the character of underlying purposes where, as here, so much attention is paid by supporters of legislation to its asserted justifications and by its opponents to the invalidity of those goals.

Frequently, of course, the unsound character of a statutory objective is self-evident and can, without the hunt for legislative motives in which courts hesitate to engage, provide the basis for judicial condemnation. (E.g., *Truax v. Raich*, 239 U.S. 33, 40-41

(1915).) We are convinced that such is the case presented here and by all durational residence requirements in welfare legislation and that this case and the related ones now before the Court may be disposed of on that ground. Nevertheless it is apposite to keep in mind that the effect of a statute, whether or not intended, may be to abridge constitutional rights and will require invalidation where no legitimate governmental interest is promoted by the measure or where such an interest is advanced but is of insufficient strength to warrant the abridgement or can be accomplished by less drastic means without infringement of the Constitution. Although the strength of the governmental interest which must appear, as well perhaps, as the care required in tailoring legislation to serve it, may vary depending upon the importance of the particular right involved, there is potential in every constitutional attack the question of effect independent of purpose.

The point is well illustrated by *Sherbert v. Verner*, 374 U.S. 398 (1962). In condemning the statute there involved, this Court did not hold that the abridgement of the freedom of religion was intended. To the contrary, in approaching the problem, it took care to emphasize that the statute must fall if its purpose "or effect" was the curtailment and there was no compelling governmental justification. (374 U.S. at p. 404.)

It is with the foregoing in mind that we, although satisfied of the nature and invalidity of the legislative intent here, address ourselves in some detail to the

effect of durational residence requirements in welfare legislation.

II. THE EFFECT OF DURATIONAL RESIDENCE REQUIREMENTS IN WELFARE LEGISLATION IS TO IMPOSE A SERIOUS RESTRAINT ON MOVEMENT BY THE POOR AND A DISCRIMINATORY AND DRASTIC PENALTY UPON PERSONS WHO MOVE

The discriminatory effect in regard to a vital concern is plain from the face of every durational residence requirement in welfare legislation. All unable to meet the requirement, although otherwise eligible under the prevailing standards, are denied public assistance; all identically situated except for the duration of residence are granted the assistance. At stake on the basis of this sole difference is nothing less than the means to subsist, to acquire food, shelter, and other necessities of life. The dire consequence is such as to be anticipated in some instances and always to be suffered, whether or not anticipated, and the requirement thus operates both as a serious restraint on poor persons wishing to move into a jurisdiction and as a drastic penalty upon persons who have recently moved there and are in need.

A full assessment of the durational residence requirement calls for some precision of statement which neither champions nor detractors have always been ready to acknowledge. Not infrequently in the polemics in this field, therefore, one confronts hasty generalizations and internal inconsistencies. Thus, for example, those seeking to justify the requirements

speak of the influx of recipients to be expected in the absence of such restrictions and yet disclaim that the requirements impede movement and disregard that, in any event, those who have recently come into a jurisdiction and need assistance are penalized for having moved. On the other hand, opponents of the legislation have sometimes concentrated on the deterrent and punitive impact which cannot reasonably be denied, while tending to belittle the possibility of an increased influx of the poor in some instances and to leave unmentioned the fact that, notwithstanding the restrictions, some persons needing or likely to need assistance appear to change their state of residence and may, with luck, suffer no hardship.

The truth seems to us clear. Although there are specialized data and opinions pointing to it, we know of no scientific study conclusively establishing it and doubt that, in the nature of the problem, there will ever be such a study. As is common in regard to the effect of enactments generally, assessment by courts is not controlled by expert evidence or opinions contained in the particular record or judicially noticeable but depends, in the final analysis, upon a consideration of the tendencies and consequences judicially attributable to a measure in the light of its terms and their natural or reasonably expectable impact on those subjected to their operation.[1] So approached, and

[1] This Court, for example, did not depend on any special demonstration in discerning the restraint in *Thornhill v. Alabama*, 310 U.S. 88, 97-98 (1939), or the penalty in *Sherbert v. Verner*, 374 U.S. 398, 405-406 (1962).

with the guidance and decisions assessing other statutes, the legislation now before the Court, although it may not be uniform or absolute in its operation, must be viewed as effecting both a restraint and penalty upon movement of constitutionally significant dimensions.

A. The Restraint Upon Movement by the Poor Is Demonstrated by Common Sense and by Judicial Assessment of Other Provisions

It is submitted beyond reasonable controversy that durational residence requirements in welfare legislation operate as a prior restraint upon thousands of poor Americans wishing to move from one jurisdiction to another. This fact seems inescapable when common sense is brought to bear on the prevalence of such requirements throughout the country, the extremity of their length, and the gravity of the denial of aid to those in need of it. Moreover, recognition of that fact is called for by decisions which concern other provisions affecting movement.

(1) Common Sense

The common sense approach must begin with recognition of the prevalence and severity of the durational residence requirements. According to recent compilations, only about one-fifth of all the states have eliminated such requirements as to one or more categories of aid. The remainder retain, as to all forms of aid, restrictions ranging from six months to five years. (See Morton, *1967 Public Welfare Directory*, p. 208, Table 1.)

For true perspective, the foregoing must be coupled with the vastness of the population dependent on assistance. It has lately been reported that the average total of persons receiving federally supported aid (that is, without inclusion of recipients of general assistance provided by states and localities alone) is 7.5 million per month. (See *Report of the National Advisory Commission on Civil Disorders* (Bantam Books ed. 1968) p. 457.)

Out of these millions of recipients, it is to be expected that there are a number who may be unaware of the existence of durational residence requirements or who, though having such knowledge, undertake to move elsewhere because of high assurances of employment or interim economic help or other compelling considerations, such as health, or because they are just plain reckless. Such persons, as well as those whose need arises after moving but before satisfaction of the requirements, would be affected by the bite of the statute but not its restraining arm.

On the other hand, it requires no expertise to recognize that the millions of recipients must include many who, for a variety of reasons, would wish to move but realize their need for continued assistance and their ineligibility to receive it for months or even years if they go to any but a handful of jurisdictions. Their choice is to remain where they are or invite disaster. Quite naturally, those faced with that choice must in large numbers elect the former course. To say less is to regard recipients of assistance as

a breed apart, devoid of average intelligence and normal reluctance to embrace hardship.

(2) Decisions Assessing Other Provisions

The constitutional dimensions of the restraint thus exerted on movement by the poor seem clear from prior decisions of this Court.

Preliminary note should be taken in this connection of First Amendment decisions establishing that prior restraints flowing from enactments are to be considered in determining their validity even though they are not absolute or uniformly effective and come before the Court in the person of one who disregarded the restraint and suffered the penalty. (E.g., *Staub v. City of Baxley,* 355 U.S. 313, 320-322 (1958); *Kunz v. New York,* 340 U.S. 290, 293 (1951); *Thornhill v. Alabama,* 310 U.S. 88, 97-98 (1939).) As will be discussed later in more detail, the freedom of movement is a right akin in importance to First Amendment freedoms, and the doctrine of the cited cases should for that reason alone be applied wherever restraint on movement is involved. However, this does not find its force solely in analogy. In *Edwards v. California,* 314 U.S. 160 (1941), the statute was condemned for its burdensome effect on movement even though the one subjected to its penalty had not been restrained by it but had already transported the indigent into the state.

More important, perhaps, than the rather self-evident proposition that a restraint need not be absolute

or invariably effective in order to achieve constitutional dimensions is a comparison of the restraint at hand with a few examples of impediments heretofore accorded such significance by this Court. The prospect of losing the means of subsistence for months or years cannot reasonably be deemed less threatening than the tax differential of approximately $2,500.00 for commercial fishermen described as "practically exclusionary" in *Toomer v. Witsell,* 334 U.S. 385, 396-397 (1947). Certainly, the exclusionary effect of the threat involved here must be much greater than the $45.00 tax differential for fishermen which, under the authority of *Toomer,* was condemned in *Mullaney v. Anderson,* 342 U.S. 415 (1951). Nor, even with the notoriously steady decline of the dollar can the small tax in *Crandall v. Nevada,* 73 U.S. 35 (1897), be thought remotely comparable in severity and consequent impediment.

In short, considering the reasonably expectable, if not inevitable, impact of durational residence requirements in welfare legislation and guided by judicial precedents, we are convinced that the requirements operate as a prior restraint upon movement by substantial numbers of poor persons. We can admittedly point to no scientific study conclusively supporting us, but the nature of the problem does not feasibly lend itself to such an approach. One seeking demonstration satisfying the standards of the laboratory will search in vain among the existing materials. From our experience, he will find a few studies of narrow scope and questionable control, reliance on

facts which bear at best obliquely on the subject and often point in opposite directions, and considerable divergence of opinion among those who might be regarded as experts in the field. Here, as elsewhere, the only ultimate criteria suitable for the Court are the ones we have followed. Their result, we respectfully submit, is the soundness of our position.

B. The Discriminatory Penalty Against Poor Persons Who Move Is Obvious

Durational residence requirements in welfare legislation, in addition to their forceful operation as a restraint on movement by the poor, have the other and discriminatory effect of denying assistance to poor persons who are in need but have not lived in the jurisdiction long enough. That this drastic denial resulting solely from recent movement can properly be designated a penalty seems obvious. It imposes no less a hardship than the denial of unemployment insurance recognized as a penalty in *Sherbert v. Verner,* 374 U.S. 398, 405-406 (1962), and a far greater hardship than the loss of the tax exemption characterized as a penalty in *Speiser v. Randall,* 357 U.S. 513, 518 et seq. (1957).

Full appraisal of the extremity of the discrimination, however, necessitates examination of the requirements from two viewpoints. The typical requirement sweeps within its harsh ambit all who, although sharing the overriding trait of need for assistance and being alike in their disqualifying status of newcomers, may be dissimilar in a number of respects. This wholesale lumping is accompanied by a comparable

one in the other direction. The means of subsistence denied to newcomers are granted to those having sufficient length of residence even though they may be in less need or may possess, unlike some newcomers, traits which are sometimes relied on as negativing worthiness for solicitude and, indeed, as justifying a discouragement of entry by poor newcomers.

Thus, on the one hand, typically relegated to the same condition of unrelieved penury is the newcomer who, having a consistent history of gainful employment prior to his move, has for the first time encountered the need for public assistance and the newcomer who has always been dependent on such assistance; the newcomer who moved with subsequently unfulfilled expectations of employment or private help and the one who moved with every intention of applying for public assistance as soon as possible; the newcomer who is employable and may soon become employed and the one who is not and may never be; the newcomer for whom the existence and amount of public assistance played little or no part and the one by whom that matter was considered to be important; the newcomer, similarly, for whom the amount of public assistance available in the state of new residence would be lower than in his former abode and could constitute no attraction and the one for whom an increase would result; the newcomer whose move was his own decision and the one who, such as a child, moved with others making the choice; and the newcomer who moved with the intention of becoming and remaining a resident of the state and the one who enters the state as a sojourner only, without intend-

ing to make his home there or abandoning his former residence.[2]

The denial of assistance to such an all-inclusive class is incongruous in itself but can be fully measured in its discriminatory effect only when considered in contrast to the all-inclusiveness of the preferment. The classification based on the sole difference of duration of residence means, for example, that assistance may be denied to one who has no other source of economic help whatever and whose need is absolute, but granted to one whose need is relatively less because friends or others may be willing to aid him; denied to one who, as a taxpaying employee elsewhere, has contributed to the federal funds largely supporting the kind of assistance applied for, but granted to one who has never paid taxes anywhere;

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[2]Unlike what is true of the typical legislation under review, the statutory provisions of Connecticut involved in one of the related cases now before the Court make some distinctions among newcomers, both as to the kind of assistance sought and the length of residence required depending on variables at the time of entry with regard to prospects for employment and cash on hand. Connecticut is not alone in all such differentiations; California, for example, has eliminated durational residence requirements as to aid to the blind but not as to other forms of assistance. (California Welfare and Institutions Code, secs. 11252, 12050, 12550, 13550, 17104.) In the sense that the Connecticut approach results in treating some newcomers the same as established inhabitants, it is less vulnerable to attack for discrimination than the typical legislation, but it may be more vulnerable in the sense that it results in discriminatory classifications among newcomers. We have not undertaken in this brief to discuss the latter phase of the subject. However, irrespective of the variations in the Connecticut law, the observations and arguments made in this brief as to the more common legislation are applicable to that law, or any other law, to the extent that assistance is denied to a class or classes of newcomers by a durational residence requirement of any substantial length, whether the period be a year or more or, as is partially the case in Connecticut, three months.

denied to one who, having never required public assistance before and expecting employment, moved without thought or concern about the existence or amount of such assistance to be available in his new home, but granted to one who was receiving public assistance elsewhere and was induced to move by the availability of more generous amounts, expecting and receiving interim help until he could comply with the durational residence requirement; and denied to one who is employable and anxious to become self-supporting, but granted to one who is unemployable or lacks the positive motivation to cease his dependency.

We do not mean to suggest that any or a combination of the variables discussed above has any legitimate role in welfare legislation or should be determinative of validity if taken into account in the formulation of a durational residence requirement. To the contrary, we are convinced that, if a newcomer has moved into a jurisdiction with the intention of residing there and is otherwise eligible for assistance under the standards applicable to others, a durational residence requirement cannot be used to deny him, without regard to such variables. Our objective in the foregoing discussion has been merely to illustrate the utter lack of selectivity in penalizing those needy persons who have recently moved, a point which, as will be indicated in more detail later, is particularly important in view of some of the purposes and arguments defenders of durational residence requirements advance in vainly seeking to justify them.

III. DURATIONAL RESIDENCE REQUIREMENTS IN WELFARE LEGISLATION, BOTH IN PURPOSE AND EFFECT, VIOLATE CONSTITUTIONAL GUARANTEES OF THE FREEDOM OF MOVEMENT AND EQUAL PROTECTION AND DUE PROCESS OF LAW

It is respectfully submitted that durational residence requirements in welfare legislation are violative of more than one right guaranteed by the federal Constitution, and for much the same reasons. The crux of the multiple infringements is that, in a respect whose peer for harshness would be difficult, if not impossible, to find in the non-criminal sphere, persons living outside a jurisdiction or recently moving into it are arbitrarily discriminated against. We believe that the discrimination and its consequent restraint and penalty upon movement must be said in general to coincide with legislative intent, but, as noted earlier, that premise is not essential for invalidity. The effect discussed above, both restraining and penalizing, is there, whether or not intended, and the governmental interests advanced or imaginable in asserted justification of such a statutory scheme are ones which, at worst, are impermissible or lack compelling or rational force and which, at best, may be implemented by narrower and less drastic means. The result is a violation of the freedom of movement, which understandably occupies a preferred position under the Constitution and is specially safeguarded by principles judicially developed. Also, of course, provisions open to such criticisms must contravene the Equal Protection and Due Process Clauses of the Constitution, whether the operation of those clauses be regarded in

this context as inextricably entwined with the freedom of movement or as having an independent impact by reason of the invidious discrimination involved.

A. The Freedom of Movement Occupies a Preferred Position Under the Constitution and Is Safeguarded by Special Principles

The existence of the freedom of movement is now, of course, settled. We offer no observation on that phase of the problem other than to suggest that the divergence in emphasis which, as this Court has recognized *(United States v. Guest,* 383 U.S. 745, 759 (1965)), has been experienced in search for the primary textual source in the Constitution arises simply from the fact that, although the right is not specifically mentioned in any provision, it is encompassed and fortified by several, not unlike the case of the right of privacy. What is more important than the precise source or sources of the freedom is its preferment and the special rules applicable in reviewing attempts to abridge its exercise.

The former judicial hesitancy to name the freedom of movement and elevate it to its proper place under the Constitution came unmistakably to an end with the recent decisions involving both interstate and international travel and reviewing earlier cases and other authorities. None can now doubt that the freedom of movement is "fundamental to the concept of our Federal Union" and "basic in our scheme of values." *(United States v. Guest,* 383 U.S. 745, 757 (1965); *Aptheker v. Secretary of State,* 378 U.S.

500, 506 (1963); *Kent v. Dulles*, 357 U.S. 116, 126 (1957).)

Because this freedom has thus an importance akin to that of First Amendment rights, the reasonable conclusion would be, even in the absence of authority, that legislation abridging it should be judicially scrutinized under the same strict standards of review as are familiarly applied in First Amendment cases. Authority, however, is not lacking; such was the express holding of this Court in *Aptheker v. Secretary of State*, 378 U.S. 500, 508 et seq. (1963).

Some, including appellants, have fallaciously asserted, in effect, that the Court did not actually mean what it said in *Aptheker* and that this is demonstrable by the subsequent decision in *Zemel v. Rusk*, 381 U.S. 1 (1964). The argument runs that the strict standards of review are appropriate to safeguard the freedom of movement only where, as in *Aptheker*, First Amendment freedoms are connected with it. Nothing in *Aptheker* warrants such a construction. To the contrary, the Court did not base its condemnation on the First Amendment but on the Fifth and did not resort to the strict standards of review because a violation of the First Amendment itself was potential under the particular facts but because the right of movement in its own "basic" importance was "closely related" to the First Amendment freedoms. (378 U.S. at pp. 514-517.) We cannot fairly read *Zemel* as undermining *Aptheker*. To be sure, a different result was reached, but this is explainable by the difference in facts, and nowhere did the majority reason that

the strict standards of review were not applicable or could not be satisfied. The observation (381 U.S. at p. 16) that the appellant's claim was unlike the claim in *Aptheker* was merely set forth in the course of rejecting the contention that the First Amendment itself had been violated. To conclude from this that *Zemel* limited *Aptheker*, intending to initiate the notion that movement unlinked with First Amendment rights is not a freedom of the basic kind calling for special safeguards, is to ignore the Court's subsequent declaration that the freedom of movement is "fundamental to the concept of our Federal Union." *(United States v. Guest*, 383 U.S. 745, 757 (1965).)

We proceed then to consider some of the special safeguarding principles developed in First Amendment cases and other decisions relevant to the freedom of movement.

(1) A Compelling Governmental Interest Must Be Present

One of the special principles is that any abridgement is invalid unless based on a "compelling" governmental interest. No showing merely of a "rational relationship to some colorable state interest" will suffice; only the "gravest abuses, endangering paramount interests," can permit limitation. (E.g., *Sherbert v. Verner*, 374 U.S. 398, 406 (1962).) This principle, commonly applied in First Amendment situations, was not expressly mentioned in *Aptheker* as applicable to the freedom of movement, there being no necessity since the case could be disposed of on

the grounds of overbreadth without considering whether a governmental interest of sufficient strength was involved. However, this principle in reference to freedom of movement is no less appropriate than the other First Amendment principles referred to and applied in *Aptheker* and is, indeed, an integral part of the bundle established by the decisions relied on in *Aptheker,* including *NAACP v. Button,* 371 U.S. 415, 438 (1963).

It merits emphasis that the recent concern accorded to the freedom of movement does not mark a sudden departure from precedent, completely unheralded by prior decisions. It seems fair to say that the freedom of movement, though not always spoken of in those terms, had actually been involved in earlier decisions concerning discrimination between residents and non-residents, citizens and non-citizens, and the like. Most frequently, such decisions were wont to speak of reasonable regulations as permissible, without much precision of statement as to the strength of governmental interest which must be present for justification. This, however, was not invariably true.

More than twenty years ago, the Court was called upon to deal with a discrimination as to which the freedom of movement was not far removed, if not involved, namely, a discrimination among children based on the country of their parents' origin. In striking down the provision, the Court pointed out that there was absent the "compelling justification for discrimination of that nature." *(Oyama v. California,* 332 U.S. 633, 640 (1947).)

About the same time, in *Toomer v. Witsell*, 334 U.S. 385 (1947) the difference in tax levied on resident and non-resident fishermen was invalidated as "practically exclusionary." The freedom of movement may not have been mentioned in so many words, and it is true that some of the language of the opinion indicated the test of permissible regulation to be the one of reasonableness voiced in earlier decisions. However, the reasoning crucial to the result (334 U.S. at pp. 397-398) was that mere promotion of a valid objective could not justify discrimination between residents and non-residents and that such a classification is unlawful unless non-residents constitute a "peculiar" source of the "evil" aimed at. It is submitted that this approach contemplated an objective not only valid but of extraordinary force. It requires little, if any, extension of that approach to conclude that a compelling governmental interest must appear before a classification between residents and non-residents or any impediment to free movement, can be justified. In any event, such is now the law.

(2) Legislation Must Avoid Overbreadth in the Light of All Its Applications

The freedom of movement is further safeguarded by the standards of judicial review which are common in First Amendment cases and are designed to protect against overbreadth of legislation. A provision, even though addressed to a legitimate purpose, must not operate "unnecessarily broadly" and will be declared fatally defective if its objective could have been achieved "more narrowly" and by "less drastic

means." In legislation affecting this basic right, "precision must be the touchstone." These were the declarations in *Aptheker* (378 U.S. at pp. 508, 512-514) where the applicability of an important corollary was also made clear, namely, that factual application other than the one at bar will be considered in assessing the validity of a provision. (378 U.S. at p. 517.)

It should be noted in passing that close scrutiny for overbreadth has been accorded to legislation affecting important rights other than those in the First Amendment and the freedom of movement. *(Carrington v. Rash,* 380 U.S. 89, 95 et seq. (1964).)

(3) The Burden Is the Government's

Also worthy of note is the principle that the governmental entity, not the individual challenging the legislation, has the burden with respect to whether an interest of sufficient force is served with sufficient precision. The individual is not required to prove that a less drastic statute could not be constitutionally written; it is incumbent upon the government to demonstrate that no alternative form of regulation could accomplish the purpose without infringing constitutional rights. *(Aptheker v. Secretary of State,* 378 U.S. 500, 517 (1963); *Sherbert v. Verner,* 374 U.S. 398, 407 (1962).)

It follows that, in the area of free movement, the presumptions of constitutionality often invoked in support of legislation are not available.

B. Durational Residence Requirements in Welfare Legislation Serve No Permissible Compelling or Rational Governmental Interest and Are, in All Events, Too Drastic and Too Broad

As discussed previously, every durational residence requirement in welfare legislation is discriminatory on its face in a manner relating to movement and resulting in sweeping inequality of treatment with respect to a matter of vital concern. If it could be assumed that any such discriminatory requirement is purposeless, it would obviously be invalid. We think that, typically, the requirements have an underlying objective, and one plain to see: the exclusion of the poor who are, or are likely to be, in need of assistance supported by public funds. Even if restraint fails to prevent entry in the first instance, the withholding of assistance for the period prescribed may operate to encourage potential recipients to return whence they came and will, at the very least, defer additional expenditure until the end of that period.

The restraint and penalty upon free movement by the poor thus aimed at are impermissible, as is clear not only from the recent decisions dealing with freedom of movement but also under the cases concerning the condition of poverty. Contrary to the basic purpose of welfare legislation, persons in need are threatened with loss of, or actually denied, the means to subsist, and without the compelling governmental justification which must be present. Not even a colorably rational relation to a legitimate governmental interest is discernible. Insofar as non-exclusionary justifications have been advanced, we submit they are unconvincing afterthoughts apologetically urged in

substitution for the real and manifestly improper objective. Even if there were some doubt as to whether any of the asserted objectives has a sufficient and permissible relationship to durational residence requirements, they must fail because narrower and less drastic measures can serve as well.

(1) Discrimination Without a Purpose

To begin with, a brief word should be said about the possibility that durational residence requirements in some states may be nothing more than the original product, perpetuated through inertia, of either aimless parroting of law elsewhere or, at most, the provincial inclination to draw distinctions generally between established inhabitants and "outsiders." It is not amiss to recall in this connection the familiar fact that the pressures incident to frontier infancy led not infrequently to the hasty and massive copying of laws existing in other jurisdictions. Nor can we ignore that even in this modern day, as we understand the situation, Pennsylvania was unable to define the purpose of its durational residence requirement at the trial of the case now pending before the Court.[3]

As we have seen, classifications having an exclusionary effect must be aimed at some peculiar evil represented by the excluded persons, and a compelling governmental objective must be shown to underlie with precision any abridgement of the freedom of movement. Patently, to the extent that any durational

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[3]We have not had an opportunity to examine the record in the Pennsylvania case. In this respect and others to be mentioned later, we have relied on the lower court's opinion there.

residence requirement exists in welfare legislation as the result of the haphazard lawmaking here under discussion, whether in Pennsylvania or elsewhere, it must fall.

(2) The Exclusion of the Poor to Protect the Treasury

We are satisfied, as already indicated, that, typically, durational residence requirements in welfare legislation have a definite purpose, the exclusion of poor persons who are, or are likely to become, in need of assistance from public funds. This we think is evident, in the first instance, from the all-inclusiveness of the requirements themselves. Even if not invariably so, the prospect of attributing to lawmakers a mindlessness at odds with their trust must render rare, at most, the occasions justifying departure from the injunction of Justice Hughes that the purpose of an enactment "must be found in its natural operation and effect." (*Truax v. Raich,* 239 U.S. 33, 40 (1915).)

The intent of this legislation is also readily discernible from its history and from its frequent company with other provisions having the same exclusionary purpose, such as the kind condemned in *Edwards v. California,* 314 U.S. 160 (1941), and the so-called removal statutes. Durational residence requirements, like the related laws, find their distant ancestry in the settlement concepts concerning the responsibility to care for the needy and in negative attitudes toward the destitute. (See, e.g., tenBroek, *California's Dual System of Family Law: Its Origin, Development, and Present Status,* 16 Stan.L.Rev. 257, 259-265 (1964);

Jordan, *Philanthropy in England 1480-1600,* at pp. 78-83 (1959); Harvith, *The Constitutionality of Residence Tests for General and Categorical Assistance Programs,* 54 Cal.L.Rev. 567 (1966).)

Certainly, students of the subject, such as those just cited, have experienced no difficulty in recognizing the exclusionary aims underlying the durational requirements. And, in fact, appellants themselves admit in their brief that the requirement in the District of Columbia has an exclusionary purpose, although they would have us believe that the persons sought to be excluded are limited to those in nearby jurisdictions where lower amounts of assistance are provided.

Whatever the legitimacy of such objectives in the bygone days of Elizabethan England and incipient America, when it was deemed fitting that one in need look for help to his birthplace and be classed with the criminal, the diseased, and the immoral (not without judicial toleration), their legislative perpetuation is no longer permissible. These are different times rendering such attitudes anachronistic and necessitating under the Constitution different response to poverty and its incidents. This is the cardinal teaching of *Edwards v. California,* 314 U.S. 160 (1941), joined in by the majority and the concurring justices alike. The problems and financial burdens of states in dealing with poverty and movement by the poor were acknowledged but could not justify the defective provision because there is no "more certain" prohibition against state legislation than the one against an

attempt by a state "to isolate itself from difficulties common to all of them by restraining the transportation of persons and property across its borders." (314 U.S. at p. 173.) Although the obligation to provide relief to the needy was not involved or decided, the Court took pains to point out that the theory of the Elizabethan Poor Laws "no longer fits the facts"; that, particularly in the preceding decade, the task of providing relief to the needy had in not inconsiderable measure become the "common responsibility and common concern of the whole nation"; and that the poor could not be regarded as a "moral pestilence" giving rise to an exception to the limitation on a state's power to restrain movement. (314 U.S. at 174-177.)

Decisions subsequent to *Edwards* have kept faith with its teaching and may even be said to have extended it. The poor are not only to be free from restrictions aimed at preventing their exercise of basic rights but may demand the affirmative assistance of government to place them on a footing of equality which, without assistance, their lack of means would deny them. Thus the destitute accused of crime are entitled to have trial counsel appointed to defend them. (*Gideon v. Wainwright,* 372 U.S. 335, 339 et seq. (1962).) But solicitude for the poor has not been confined to the exercise of basic rights such as the freedom of movement and the right to counsel. Accordingly, although a state is not required to provide for appellate review in criminal cases, it must, if it does so, expend whatever funds may be necessary to

assure that those too poor to avail themselves of the remedy without help have substantially as full an appeal as the rich can afford, including counsel and trial transcripts. (*Douglas v. California*, 372 U.S. 353, 355 et seq. (1962); *Griffin v. Illinois*, 351 U.S. 12, 18-19 (1955).)

Accordingly, neither poverty as such nor the drain on public money it may entail can justify impeding entry by the poor or denying them equal treatment after arrival. If, as we think, durational residence requirements in welfare legislation have such an aim, their purpose is impermissible. It merits emphasis that the impropriety of such objectives in the case of welfare legislation is particularly apparent because of the extent to which the financial burden is borne federally, rather than by subordinate jurisdictions. Ninety per cent of all welfare payments are of the type supported by federal funds, and, on the average, federal money constitutes more than one-half of the various categories of payments supported. (See *Report of the National Advisory Commission on Civil Disorders* (Bantam Books ed. 1968) p. 457; Dept. of Health, Education, and Welfare, Social and Rehabilitation Service, *Advance Release of Statistics on Public Assistance*, Table 1 (Nov. 1967).)

(3) Exclusion of Poor Persons Seeking More Generous Amounts of Aid

A variant of the purpose just discussed is the asserted explanation that durational residence requirements in welfare legislation are designed to discourage entry by persons in quest of higher amounts of as-

sistance than they receive elsewhere.[4] This is one of the objectives advanced by appellants as to the District of Columbia. There are several reasons for rejecting such an asserted justification.

To start with, all reasonable indications are opposed to the assertion that the exclusionary objective is in fact so limited. The breadth and origins of the legislation confirm that a broader ban was intended, and a pretense of a limited objective confronts at once the embarrassing fact that such requirements prevail in the vast majority of jurisdictions in the country, not all of which can be heard to claim more generous assistance programs than the rest. The District of Columbia does not rank in the top ten jurisdictions with respect to the amount of any of the various categories of aid supported by matching funds. (See Dept. of Health, Education, and Welfare, Social and Rehabilitation Service, *Advance Release of Statistics on Public Assistance,* Tables 3, 4, 5, 6, and 7 (Nov. 1967).) Even if it be supposed that, in a given instance, special materials bearing on legislative intent could permit disclaimer of what statutory language and general history show, appellants have come forth with none. And, perhaps, the most telltale proof of all is eating the pudding served up by the present record. We see here no selective application of the

[4] In view of evidence introduced in the Connecticut and Pennsylvania cases (which we have not personally examined but which are referred to in the respective lower court opinions), we are compelled to observe in passing that there is serious doubt that any significant number of persons change their place of residence in order to receive welfare payments, let alone more generous payments.

requirement in keeping with the limited objective asserted. Among the appellees denied assistance is one (Harrell) who sought family aid after coming from New York, where the amount of such aid is higher than anywhere in the nation (see *Report of the National Advisory Commission on Civil Disorders* (Bantam Books ed. 1968) p. 458), and one (Barley) who has lived in the District for years in a mental institution.

More important, the impermissibility of a limited objective even if cognizable, is established by what has already been considered in regard to the aim of excluding the poor generally. Entry by the poor in consideration of welfare payments rather than for some other motive may be thought to increase the likelihood of financial burden from their movement, but the wish to protect public funds does not permit exclusion of the needy or denying them equal treatment after they arrive. One suspects that a motive so in conflict with *Edwards* and the subsequent decisions dealing with poor persons is advanced in the hope of enticing sympathy for the notion that there is something reprehensible in choices of residence influenced by the amount of public assistance available there. Such a notion is little, if any, removed from those outmoded attitudes discredited in *Edwards*. Blame for seeking the most effective help against the incidents of poverty is on a par with hostility toward the state of being poor. Relief from the ravages of poverty is no more immoral than poverty itself. One who is in need and decides to make his home else-

where because of the availability of more assistance is no fitter object for aversion or exclusion than one who, rich or poor, is influenced to move by the higher calibre of schools for his children, the greater reliability of the police, or, for that matter, the character of any publicly financed service or facility.

We add briefly that, even if exclusion of the limited kind in question had been the true objective and could be defended as legitimate, the durational requirements in the District of Columbia and throughout the country lack the precision necessary to effectuate such a purpose. By reason of their all-inclusive sweep, the restraints operate without regard to whether potential recipients are presently in jurisdictions with higher or lower amounts of aid, and the penalty upon newcomers is as great irrespective of the kind of jurisdiction from which they came or whether they even gave a thought to the availability and amount of assistance in their new home. Obviously, much narrower and less drastic means would be at hand to achieve the asserted aim. The removal of the possible attraction of higher amounts of assistance could, for example, with far less harsh results than an all-inclusive durational residence requirement, be accomplished by simply limiting newcomers from jurisdictions with lower amounts to the same payment as there received.

(4) Exclusion of Those Who Will Not Work

Another and equally vulnerable variant of the purpose to exclude the poor and protect the treasury is

presented by the assertion that the objective of durational residence requirements is the more limited one of excluding persons unwilling to work. The incredibility of such a limited objective in enacting the typical durational requirement, the impermissibility of the objective if cognizable, and the failure, in any event, to legislate with sufficient precision all follow from reasoning parallel to that applicable to the asserted justification of excluding seekers of more generous benefits.

(5) Avoidance of Reducing Assistance to Established Inhabitants

A suggestion made by some, including appellants, is that durational residence requirements are aimed at avoiding the reduction in benefits for established inhabitants which might be expected to flow from the entry of additional recipients. This presents the same issue, in narrower view, as the exclusion of the poor to protect the public treasury. Whether the precise object sought to be achieved by the impermissible exclusion and unequal treatment of outsiders and newcomers is to preserve assistance at current levels, to free public money for other programs, or merely to keep from raising more funds, the impropriety does not alter. The truth, moreover, is that there is no convincing relationship between numbers of recipients and amounts of aid. New York pays among the highest amounts. (See Dept. of Health, Education, and Welfare, Social and Rehabilitation Service, *Advance Release of Statistics on Public Assistance,* Tables 3, 4, 5, 6, and 7 (Nov. 1967).) Let it be forthrightly recognized that, insofar, if at all, as reduction of

current levels of assistance would follow on the heels of the elimination of durational requirements, the reduction will be due not to more recipients but to a legislative refusal to appropriate sufficient funds to meet the needs of all the citizens of the jurisdiction.

(6) Prevention of Fraud

One justification which some, happily not appellants, have dared to advance is that the legislation is addressed to the prevention of fraud, presumably in the form of unwarranted applications for assistance by those not eligible for it independent of the durational requirement itself. It is unconscionable to suppose that newcomers are more inclined to the commission of fraud than established inhabitants with whom they are otherwise identically situated, and it is not easy to see how, in any event, durational residence requirements serve fraud prevention in any manner not as readily derived from checking procedures applicable to established inhabitants. Protection against abuse may be a worthy objective, but no more so as to newcomers than as to others, and the durational requirements simply have no compelling or rational relationship to that objective.

(7) Facilitating Administration and Budgeting

Nor do appellants join those who, eschewing the true exclusionary purpose of the legislation, would defend it in vague and unpersuasive terms relating to the administrative and budgetary goals facilitated. The unrealistic core of this line of argument seems

to be that desirable predictability of caseload is in some mysterious fashion promoted. One would expect that prediction in these matters is at best a hazardous enterprise, so affected as they must be by the intricate interplay of often fortuitous events which shape the vagaries of our economy. Our imagination falters at why the process is made more feasible by requiring that the person ultimately asking for assistance live in the jurisdiction for a certain period of time before applying. Why is the sudden plight of a resident of twenty years the easier to foretell by reason of the length and constancy of his place of abode than the need of a newcomer who comes to fill a job but loses it after a few months and requires help?

Understandably, the extent of the current year's caseload may be a factor enabling some projection of the demand in the ensuing year, but neither the existence of that factor nor consideration of it will be foreclosed or affected by elimination of the durational requirements. To the extent that projections, of necessity imperfect, must now be relied upon, together with special budgetary approaches and adjustments to cope with miscalculation, their abandonment is in no way the concomitant of eliminating durational requirements.

We submit that there is no compelling or rational relationship between preservation of durational residence requirements and sound administrative and fiscal practice. We believe, instead, the actualities are that disappearance of the durational requirements, rather than complicating the mechanics of assistance

programs, will usher in a more efficient and economical implementation.[5]

In the event that the Court is more successful than we in discerning some conceivable administrative advantage in retention of the durational requirements, we should add that important rights are not to be casually abridged "because of some remote administrative benefit to the State." (*Carrington v. Rash*, 380 U.S. 89, 96 (1964).)

(8) Testing Good Faith Residence

There is yet another apology offered for the durational residence requirements in welfare legislation, namely, that they are legitimately designed as a test to assure that recipients of assistance have in fact become bona fide residents of the jurisdiction. As in the case of the two assertions of non-exclusionary aims just discussed, we submit it as clear that this one is a desperate attempt to hide the true and impermissible purpose involved. In joining the ranks of those who rely on it, while also urging the desire to exclude persons seeking more generous welfare payments, appellants would seem to have two warring tigers by the tail. There is hardly a danger that persons moving to the District of Columbia for more aid would not intend and want to become residents there. Nor, again, is the existence of such a limited purpose consistent with the application of the durational requirement to appellee Barley.

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[5]From the lower court's opinion in the Pennsylvania case now pending before this Court, we understand that uncontroverted evidence to this effect was introduced there.

The most vulnerable aspects of the asserted justification, however, lie in another direction. There is no compelling or even rational relationship between the means and the end. One may stay in a place for a year without intending it to be his permanent home, and, on the other hand, it must be conceded that many intend to become and remain residents from the moment of entry or even before. Viewed as tests for measuring good faith residence, durational residence requirements improperly operate as a conclusive presumption, irrebuttable by the clearest proofs. (Cf. *Carrington v. Rash,* 380 U.S. 89, 96 et seq. (1964); *Aptheker v. Secretary of State,* 378 U.S. 500, 510 (1963).) Here, as in *Carrington,* one can be sure that states apply less drastic means of testing intentions in a variety of situations and would have no difficulty in quickly accepting newcomers as residents when advantageous, as, for example, in order to subject them to income tax provisions.

C. The Durational Residence Requirements Abridge the Freedom of Movement

It follows from what has been said above that durational residence requirements in welfare legislation are violative of the freedom of movement guaranteed by the Constitution. The true, exclusionary purpose is clear, and, in any event, the effect whether or not intended, is to restrain poor persons from exercising their right to move and to penalize poor persons who have recently exercised it. Finding impetus in *Edwards* and consummation in the recent cases such as *Aptheker,* the freedom of movement has at last

been elevated to its rightful perch of a preferred and specially safeguarded right. Under *Edwards* and the later cases dealing with poverty, neither that condition nor the financial burdens a state may experience as a result of it can justify the restraint exerted upon movement by the poor or the penalty imposed upon poor persons who have recently moved. The non-exclusionary objectives unconvincingly asserted in attempted justification, even if cognizable, lack the compelling quality which must be present to permit the abridgement. The durational residence requirements do not even have a rational relationship with such objectives, and, if they did, they would fail for overbreadth.

D. The Durational Residence Requirements Violate the Equal Protection and Due Process Clauses

It should be pointed out that the foregoing establishes that durational residence requirements in welfare legislation result in the invidious kind of discrimination prohibited by the Equal Protection and Due Process Clauses of the Constitution. In a case like the present one, where movement or the possibility of movement is the trait giving rise to the discrimination, it is difficult to conceive how the operation of these clauses can be separated from the freedom of movement. They are among the several provisions which may be thought to safeguard that freedom, and the Due Process Clause of the Fifth Amendment was the specific basis of the holding in *Aptheker*. The realistic approach would seem to require recognition of the existence and importance

of the freedom of movement and condemnation on the basis of the violation of that freedom as such. However, a few comments should be made as to the possibility of applying the clauses independent of the freedom of movement.

The basic purpose of welfare legislation is to assist those citizens of a jurisdiction who are in need. Yet there is an all-inclusive denial of help to newcomers accompanied by an all-inclusive preferment of established inhabitants, notwithstanding the fact that the Fourteenth Amendment declares that any citizen of the United States is a citizen of the state where he resides. The sole differentiating trait is newness of arrival, and that feature, as noted earlier, has no rational or sufficiently precise relationship to any permissible governmental objective. It may have a relationship to the avoidance or deferring of expenditures from public funds, but, under *Edwards* and the later cases concerning poverty, such as *Griffin v. Illinois*, 351 U.S. 12 (1955), that concern cannot justify unequal treatment as to a vital matter.

Thus, we believe that the Equal Protection and Due Process Clauses may be applied to condemn durational residence requirements in welfare legislation independently of the freedom of movement, although we persist in the view that the most forthright approach is invalidation on the ground of the unwarranted abridgement of that freedom.

IV. ARGUMENTS COMMONLY MADE IN SUPPORT OF THE LEGISLATION ARE WITHOUT MERIT

There remain to be considered various arguments commonly made in defense of durational residence requirements in welfare legislation. Essentially, the answers to all such arguments flow from the controlling decisions we have cited, but specific response, however brief, should be added as to some of them.

A. The Fiscal Argument

There are sometimes suggestions that governmental determinations involving the expenditure of funds raised by taxation are, somehow, especially insulated against judicial review. There is no such rule. Courts, of course, will not interfere with determinations of a fiscal character, or any determinations for that matter, if they do not affect constitutional rights or do so but are justified by considerations of sufficient strength. On the other hand, courts have not hesitated to strike down unconstitutional conditions even though, by the negative process of elimination, the result would be a different use of public funds or property from that originally intended. (*Cramp v. Board of Public Instruction, Orange County, Fla.*, 368 U.S. 278, 288 (1961); *Wieman v. Updegraff*, 344 U.S. 183, 191-192 (1952); see also authorities cited in *Sherbert v. Verner*, 374 U.S. 398, 404-405, fn. 6 (1962).) And, as already stressed, affirmative assistance by government has been required where necessary to avoid inequality as to an important matter. (E.g., *Griffin v. Illinois*, 351 U.S. 12 (1955).)

B. The Privilege Argument

The authorities just cited and many others also serve to dispose of another argument sometimes heard in this field, namely, that there is no basis for constitutional complaint against durational residence requirements because receipt of assistance is in the nature of a privilege which could have been withheld altogether in the first instance. (See, in addition to the above, a leading case on the subject of unconstitutional conditions, *Frost Trucking Co. v. R.R. Com.*, 271 U.S. 583, 592-594 (1926).).

C. The Indirectness Argument

The same authorities, including *Sherbert* and *Frost Trucking Co.*, reject the assertion that the durational requirements cannot be viewed as abridging the freedom of movement because their impact is indirect rather than a direct blockage of movement. As the cases make clear, what is important is the severity of the impact, not its characterization as indirect or direct.

D. The Non-Contractual Benefits Argument and Flemming v. Nestor, 363 U.S. 603 (1959)

Perhaps the argument most strongly pressed by appellants is that, since non-contractual benefits of welfare legislation are involved, extremely lenient standards of review are applicable. The kinship to the privilege argument is unmistakable. What appellants ignore is the crucial point that the standards a measure must meet depend not on whether it can be said to involve a benefit, privilege, or gratuity but

whether it injects in that connection a provision abridging a fundamental right. If, as we have seen, a statute curtails a First Amendment right or the freedom of movement, the government must show that a compelling interest underlies the provision.

Appellants rely on broad language in *Flemming*. That case, however, according to the majority, did not involve any fundamental rights such as the freedom of movement. Moreover, as was later pointed out in *Sherbert v. Verner*, 374 U.S. 398, 409, fn. 9 (1962), the ground of decision in *Flemming* was that Congress had a "compelling interest" in denying the benefits.

E. The Subsidy Argument

Brief mention should be made, too, of the rather absurd assertion that elimination of durational requirements, rather than removing obstruction to movement by the poor, will result in subsidizing movement by them. A comparable argument was made and rejected in *Sherbert* with respect to the establishment of religion. (374 U.S. at p. 409.)

F. Other Assertedly Similar Restraints

It is also claimed that there are various kinds of legislation having at least as great a restraining effect upon movement. Reference is made, for example, to the existence of higher taxes or stricter license requirements in one jurisdiction than in another. It is forgotten that matters of that sort differ in the vital respect that there is no discrimination in favor of established inhabitants and against outsiders and newcomers.

G. The Asserted Revolutionary Character and Disruptive Consequences of Invalidation in the Light of Other Durational Residence Requirements

Much has been heard in this and the related cases to the effect that invalidation of durational residence requirements in welfare legislation will have far-reaching and disastrous consequences. Allusion is made to residence requirements of various sorts throughout the country. One is almost led to fear that the bedrock of the nation's law is threatened with undoing.

The truth, of course, is that there is nothing revolutionary in the judicial condemnation of durational residence requirements and analogous provisions. A number of lower courts have not hesitated to act, when deemed appropriate, and with respect, in some instances, to provisions which might be thought, unlike the ones in question here, to have a chance of refuge in the apologetics of the police power. (See, e.g., *City of New Brunswick v. Zimmerman,* 79 F.2d 429 (1935) (N.J.); *Mercer v. Hemmings,* 194 So.2d 579 (1966) (Fla.); *McCreary v. State,* 165 So. 657 (1936) (Fla.); *Dusenbury v. Chesney,* 121 So. 567 (1929) (Fla.); *Newman v. Graham,* 349 P.2d 716 (1960) (Idaho); *Lipkin v. Duffy,* 196 A. 288 (N.J.); *State ex rel. McCulloch v. Ashby,* 387 P.2d 588 (1963) (N.Mex.); *People v. Gerald Bowen,* 175 N.Y.S.2d 125 (1958); *Schrager v. City of Albany,* 99 N.Y.S.2d 697; *Wormsen v. Moss,* 20 N.Y.S.2d 798.)

It is also true that there is, or at least was, a wide-ranging pattern of durational residence requirements. As to some, a rather strong or possible case of com-

pelling justification may be made. Such requirements, for example, find clear force in the area of voting, where there is understandable concern that the integrity of the election process might be undermined by the entry of masses of voters solely to cast ballots and by the unfamiliarity of newcomers with local issues, conditions, and candidates. (*Drueding v. Devlin,* 234 F.S. 721, 724 (1964) (Md.) (aff'd per curiam 380 U.S. 125 (1965)).) By analogy to the voting situation, a defense would appear to be available as to durational requirements for the holding of public office or even, perhaps, the holding of a quasi-public position such as a corporate director. And some requirements might be thought less vulnerable because they involve occupations or professions of somewhat higher than average potential for harm to the public, such as the selling of alcoholic beverages. (See *Hinebaugh v. James, Tax Comm'r,* 192 S.E. 177 (1937) (W.Va.).)

The only decision squarely in point we know of prior to the recent group, *People ex rel. Heydenreich v. Lyons,* 30 N.E.2d 46 (1940) (Ill.), is contrary to our position, but we experience no alarm on that account. It was decided without consideration of the doctrine of unconstitutional conditions and without benefit of the decision the following year in *Edwards v. California,* 314 U.S. 160 (1941). The reasoning in question, which was not the holding but dictum, ranged from the privilege argument to the justifiability of excluding the poor to protect the treasury. An approach less worthy of weight in this field is hard to imagine.

We do not pretend that some durational residence requirements may not be adversely affected by invalidation here, but, on the other hand, many will not lack grounds for distinction. We will not conjecture. What is, in any event, clear is that durational residence requirements in welfare legislation abridge a basic freedom and without serving any permissible objective which is compelling or even rational. That, for the present, is quite enough.

CONCLUSION

There is no dearth of indications that perhaps no time in our history has rivaled the present for urgency to take all feasible steps to relieve the misery of the poor. The elimination of durational residence requirements in welfare legislation would be a milestone in that direction, and fortunately, it is as legally required as socially wise. The majority of judges in several lower courts have begun the laudable work. It is now for this Court to complete it.

We pray that the judgments in this and the related cases be affirmed.

Dated, April 12, 1968.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. [redacted] 33

WALTER E. WASHINGTON et al.,
Appellants,

vs.

MINNIE HARRELL et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

No. [redacted] 34

ROGER A. REYNOLDS et al.,
Appellants,

vs.

JUANITA SMITH et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PENNSYLVANIA

BRIEF OF THE STATE OF IOWA AS AMICUS CURIAE ON BEHALF OF APPELLANTS

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 1134

WALTER E. WASHINGTON et al.,
Appellants,

vs.

MINNIE HARRELL et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

No. 1138

ROGER A. REYNOLDS et al.,
Appellants,

vs.

JUANITA SMITH et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PENNSYLVANIA

BRIEF OF THE STATE OF IOWA AS AMICUS CURIAE ON BEHALF OF APPELLANTS

In the Brief filed on behalf of the State of Iowa in the case before this court:

No. 813

Bernard Shapiro, Welfare Commission of Connecticut, Appellant

vs.

Vivian Thompson, Appellee

(Dated February 27, 1968)

the interest of the State of Iowa and arguments are set forth therein. The arguments are in support of the constitutionality of a one-year residency law for eligibility to Aid to Dependent children.

The undersigned refers to said Brief and by this reference incorporates the same as a Brief Amicus Curiae filed on behalf of the State of Iowa in both the above-captioned matters.

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APR 12 1968

JOHN F. DAVIS, CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. [redacted] 9

BERNARD SHAPIRO, Welfare Commissioner of Connecticut,

Appellant,

—v.—

VIVIAN MARIE THOMPSON,

Appellee.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 813

BERNARD SHAPIRO, Welfare Commissioner of Connecticut,

Appellant,

—v.—

VIVIAN MARIE THOMPSON,

Appellee.

BRIEF FOR THE APPELLEE

Constitutional Provisions and Statutes Involved

In addition to the statute referred to in the Appellant's Brief (p. 5), this appeal also involves Section 1 of the Fourteenth Amendment, U. S. Const.; and Conn. Gen. Stats. §17-85 (1966).

Questions Presented

I. Does the denial of aid to families with dependent children (AFDC) to an indigent resident of Connecticut because she did not arrive in the State with a job offer or sufficient personal resources to support herself for three months constitute a deprivation of her rights in violation of the Fourteenth Amendment?

II. Does the discriminatory treatment of indigent residents who have resided in Connecticut for less than one year in the administration of Connecticut's AFDC program constitute a violation of the Fourteenth Amendment?

Summary Statement of the Case

The appellee is nineteen years old and the mother of two minor children. Prior to moving to Hartford, Connecticut, she resided with her son in Dorchester, Massachusetts, where she received public assistance from the Boston Welfare Department. Such assistance continued until September, 1966, when it was discontinued because the plaintiff no longer lived in Dorchester.

In late June, 1966, the appellee and her minor son moved to Hartford, and as stipulated to by the parties and found by the lower court, established residence (A. 39a, Stip. 2; A. 21a). She was encouraged in this move by her mother, who has continuously resided in Hartford for the past eight years (A. 39a, Stip. 11). Her mother promised to assist her financially to the best of her ability, which she did by providing the appellee and her son with living accommodations and food for approximately two and one-half months (A. 40a, Stip. 20). On August 26, 1966, because of the inability of her mother to continue supporting her, the appellee and her son moved to their own quarters in Hartford. At that time, both the appellee and her son were without any personal resources, and because the appellee was five months pregnant, she was unable to accept gainful employment or to enter a work training program (A. 41a, Stips. 27-28).

On September 7, 1966, the appellee applied to the Hartford Department of Public Welfare for assistance, and on September 8, 1966, she received a check for assistance. She was informed at that time, however, that since that agency could only help her for a temporary period of time not exceeding 60 days, she would have to apply for AFDC assistance from the Connecticut Welfare Department. At that time, the appellee refused financial assistance to return to Massachusetts for the reason that she intended to remain in Connecticut as a permanent resident (A. 42a, Stip. 31).

On September 7, 1966, the appellee did apply to the Connecticut Welfare Department for AFDC and on November 1, 1966, said application was denied because the appellee failed to meet the requirements of Section 17-2d of the Connecticut General Statutes, even though she qualified for such assistance under Section 17-85 of the Connecticut General Statutes on the basis of financial need (A. 42a, Stips. 36-7).

All public assistance to the appellee was terminated as of mid-January, 1967, and from January 25, 1967, to June 27, 1967, the appellee was able to support herself and her family only because of the contributions of a private charity, Catholic Family Services of Hartford (A. 43a, Stips. 45-6). These contributions consisted of a set amount of $31.60 a week, a sum *considerably less* than what the appellee would have received from the Connecticut Welfare Department as an AFDC recipient.

Contrary to what the State recites as a fact throughout its brief, the appellee did not begin receiving AFDC prior to either the date of the lower court's decision or the date of the judgment. The decision was rendered on June 19,

1967, judgment was entered on June 30, 1967, and the appellee began receiving AFDC on July 18, 1967.

ARGUMENT

Introduction

In order that the constitutional issues in this case may be properly viewed, we are setting forth in this introduction certain facts which provide the framework for these issues. We do not contend that these facts establish the invalidity of Connecticut's residence law; that law is unconstitutional because it conflicts with the fourteenth amendment in several ways, as our argument in the body of this brief will demonstrate. These facts simply shape the context in which the constitutional issues arise.

These facts are not intended to be novel or controversial. Rather they are or ought to be commonplace. Nevertheless, an appreciation of their truth is vital to the residence cases. The elementary but important propositions that we submit to the Court are that in the United States there is widespread and gnawing poverty amidst great wealth; that this poverty is a national problem knowing no state bounds; that it has been recognized as such by the federal government; and that the welfare system is an integral means of alleviating the worst consequences of national poverty.

That gnawing poverty exists throughout the rich United States can no longer be controverted. While the conditions in "the other America" have often been discussed, a large portion of the people have not begun to fathom the depths of the problem. As President Kennedy stated in November 1963: "This is a generally prosperous country but

there is a stream of poverty that runs across the United States which is not exposed to the lives of a good many of us and, therefore, we are relatively unaware of it except statistically."[1]

In one form or another, these statistics have been cited in numerous instances. Leon Keyserling, former chairman of the President's Council of Economic Advisers, has provided the following figures:

> "In 1963, the number of families living in poverty with incomes under $3,000 . . . was 8.9 million, or an estimated 29.2 million people. The number of unattached individuals living in poverty, with incomes under $1,500, was 5 million. The total number of people living in poverty thus came to 34.2 million, or between a fifth and sixth of a nation.
>
> "More tragically still, in 1963 the number of families with incomes under $2,000 was 5.1 million, or about 16.7 million people. And the number of unattached individuals with incomes under $1,000 was 3.2 million. Thus, almost 20 million people, or substantially more than a tenth of a nation, were at least 33⅓ percent below the income levels needed to lift them out of the poverty cellar.
>
> "And none of the data just cited conveys the full meaning of poverty. For the average income of all families 'under $3,000' in 1963 was only $1,778; the average for all families 'under $2,000' was only $1,220; the average for the 1.8 million families 'under $1,000' was only $630." Keyserling, *Progress or Poverty* 17, Conference on Economic Progress (1964).

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[1] Address before the Protestant Council of the City of New York, November 8, 1963. The text is in Congressional Quarterly, November 15, 1963, p. 2003.

As President Kennedy indicated, statistics may be useful but they do not convey the essence of the plight of poverty. Testimony before the United States Senate has recently focused the nation's attention on the tragic consequences of these conditions. It has also demonstrated that poverty is not the monopoly of any one region of this country.[2] The national character of the problem was summarized in a 1962 report on economic progress as follows:

> "In the West, slightly more than one-fifth of the multiple person families lived in poverty in 1960; in the Northeast, somewhat less than one-fourth; in the North Central region, about three families in every ten; and in the South, close to five families in every ten . . . Among unattached individuals in 1960, four-and-a-half in every ten lived in poverty in the West; very close to half in the Northeast; more than half in the North Central region; and about two-thirds in the South." *Poverty and Deprivation in the U. S.: The Plight of Two-Fifths of a Nation,* Conference on Economic Progress 40 (1962).

In the Southeast, poor people—especially black citizens of the rural South—often live in conditions of crippling "hunger, malnutrition, or starvation." Southern Regional Council, *Hungry Children* (1967). Editorial: *Starvation in Mississippi,* New York Times, March 26, 1968, p. 44, col.

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[2] This fact is further demonstrated by the testimony given before the lower court by the Director of the Hartford Department of Public Welfare. Of the 334 persons subject to the statute in issue in this case who applied for public assistance from the Hartford Department of Public Welfare during the fiscal year April 1, 1966, to March 31, 1967, the breakdown on their places of origin is as follows: Puerto Rico (123); New England States (50); New York, New Jersey and Pennsylvania (70); Southern States (58); Midwestern and Western States (22). Transcript, p. 13.

I. Unemployed inhabitants of Appalachia have become exiled from the prosperity of America and have involuntarily become "a society on the dole." Stern, *The Shame of a Nation,* 23 (1965). Migrant laborers, in all regions of the country, daily face the unpredictable problems caused by unemployment and underemployment. Harrington, *The Other America,* 57-9 (1963). And residents of urban areas —especially in the ghettos of the "inner cities"—are plagued with so many problems, that civil disorders are becoming common phenomena. See generally, *Report of the National Advisory Comm'n on Civil Disorders* (1968).

The Executive Branch and the Congress have appreciated the necessity for mutual cooperation and federal action in attacking the problems, not only which cause poverty but also which stem from its widespread presence. Together they have designed a coordinated attack on some of the manifestations of proverty—poor food,[3] housing,[4] education,[5] medical attention,[6] and income opportunities.[7] Fur-

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[3] Food Stamp Act of 1964, 7 U.S.C. §§ 2011-25 (Supp. 1967); Commodity Distribution Program, 7 U.S.C. § 1431 (Supp. 1967), *amending* 7 U.S.C. § 1431 (1964).

[4] Housing and Urban Dev. Act of 1965, 42 U.S.C. §§ 1401 et seq. [Public Housing Program, Low-Rent Housing], 1701 [Rent Supplements], §§ 1450 et seq. [Slum Clearance and Urban Renewal] (Supp. 1967); Demonstration Cities and Metropolitan Development Act of 1966, 42 U.S.C. §§ 3301-13 (Supp. 1967).

[5] Title I of the Elementary and Secondary Act of 1965, 20 U.S.C. §§ 241a et seq. (Supp. Feb. 1968); *amending* 20 U.S.C. § 241a (Supp. 1967); Vocational Education Act of 1963, 20 U.S.C. §§ 15aa, 15bb, 15aaa, 35-35 N (Supp. 1967).

[6] Health Insurance for the Aged Act, 42 U.S.C. §§ 1395 et seq. (Supp. 1967); Child Health Act of 1967, 42 U.S.C. §§ 701 et seq. (Supp. Feb. 1968).

[7] Economic Opportunity Act, 42 U.S.C. §§ 2921-25 (Supp. 1967), *amending* 42 U.S.C. §§ 2921-25 (1964); Manpower Development and Training Act, 42 U.S.C. §§ 2571 et seq. (Supp. 1967) [Manpower Development and Training Program].

thermore, the Office of Economic Opportunity was created in order to coordinate the various poverty programs and to bring them directly to the poor.[8] In short, the federal government has been fully aware of the need for common and cooperative efforts in this area of great national concern.

One of the recognized effects of widespread poverty has been the movement of poor people to new areas for the purpose of establishing a new life. Countless studies have sketched in detail the movement of poor people leaving their old homes in desperation and arriving at their new residences with hope. See e.g., *Report of the National Advisory Comm'n on Civil Disorders, supra* 235-250. This movement is caused by several factors. Each year, countless persons are displaced from their jobs by the ever increasing mechanization of the economy and migrate to new areas in the hope of finding employment. Also, large numbers of poor persons move for the same complex personal reasons that all other persons do.

If it is true that great numbers of poor people are constantly making new homes in order to make meaningful changes in their lives, it is also true that these hopes are often dashed and transformed into bitter frustration. The recent migrant is often unaware of the techniques and demands of living in a new environment; he often lacks the

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[8] Economic Opportunity Act, 42 U.S.C. §§ 2737-49 (Supp. Feb. 1968) [Work and Training for Youth and Adults]; Manpower Development and Training Act, 42 U.S.C. §§ 2571-74, 2581-83 (Supp. 1967), *amending* 42 U.S.C. §§ 2571, 2582-83, 2585 (1964) [Youth Opportunity Centers]; Economic Opportunity Act, 42 U.S.C. §§ 2711-29 (Supp. Feb. 1968), *amending* 42 U.S.C. §§ 2711-20 (1964) [Job Corps]; Economic Opportunity Act, 42 U.S.C. §§ 2781, 2790-97 (Supp. Feb. 1968), *amending* 42 U.S.C. §§ 2781-91 (1964) [Head Start].

educational prerequisites to learn quickly in his new surroundings; and he usually does not have the political and organizational support to provide help.

In these circumstances, in order to survive with a modicum of decency, the newcomer is often soon forced to turn to public welfare for needed assistance. But, as numerous commentators have indicated, the request for welfare assistance is often either denied or approved at a high price to the applicant.[9] Despite a long religious tradition of hospitable treatment for the newcomer ("... and if a stranger sojourn with thee in your land, ye shall not vex him. But the stranger that dwelleth with you shall be unto you as one born among you and thou shalt love him as thyself for ye were strangers in the land of Egypt." Leviticus, 19:33-34), most states have added misery to the plight of the poor by enacting one year residence requirements for welfare recipients. Two perceptive and experienced observers have put it well when they said that these one year requirements "impose a social injustice on individuals who move—however socially desirable their motivation—and endanger the whole concept of a federally-aided, state-administered public welfare responsibility." Wickenden and Bell, *Public Welfare: Time for a Change* 27 (1961).

[9] Harvith, *The Constitutionality of Residence Tests for General and Categorical Assistance Program*, 54 Calif. L. Rev. 567, 617-618 (1966); Report to the Moreland Commission on Welfare Findings of the Study of Public Assistance Program and Operations of the State of New York 78 (Nov. 1962) (Greenleigh Assocs., Inc.).

I.

Section 17-2d Is Invalid Because It Infringes the Right to Travel in Violation of the Privileges and Immunities Clause of the Fourteenth Amendment.

It is now recognized without dissent that the right to travel from one State to another is a fundamental right under the Constitution. The Court in its most recent opinion on this issue defined it as "a basic right under the Constitution." *United States* v. *Guest*, 383 U.S. 745, 758 (1966). Justice Harlan in a separate opinion in the same case, quoting from *Corfield* v. *Coryell*, 4 Wash. C.C. 371 (1925), referred to it as one of "those privileges and immunities which are, in their nature, *fundamental*." 383 U.S. at 764. The members of the Court have differed on occasion as to the source of this right under the Constitution and although the Court in *Guest* was unanimous that the right exists, these differences were once again left unresolved. 383 U.S. at 759. Despite the recognition in *Guest* that "differences in emphasis" do exist, the Court's opinion supports the conclusion that regardless of what other sources of protection this right has under the Constitution, it is protected by the privileges and immunities clause. The thrust of Justice Stewart's opinion, that "the . . . right to travel from one State to another . . . occupies a position fundamental to the concept of our Federal Union," 383 U.S. at 757, suggests that the right does attach as the result of national citizenship.[10] Furthermore, the earlier opin-

[10] It has been said of the right to travel that it is "an aspect of personal liberty guaranteed by the . . . Fourteenth Amendment [which is] irreparably appertinent to national citizenship." tenBroek, *The Constitution and the Right of Free Movement* III-C12 (National Travelers Aid Ass'n 1955).

ions of the Court which Justice Stewart relied on as authority for the existence of the right to travel all described the right to travel as a right of national citizenship protected by the privileges and immunities clause of the fourteenth amendment. 383 U.S. at 758.

Section 17-2d unconstitutionally interferes with the right of indigent persons to travel to Connecticut. Indeed, Connecticut does not dispute that interference is an inevitable result of the statute. Any person contemplating travel to Connecticut must reckon with the fact that if he is indigent or becomes indigent soon after arrival, he will be ineligible for AFDC benefits he would have received had he not traveled or had he traveled to a State without a residence law. Furthermore, it is certain from the record that persons do leave Connecticut immediately after arriving because of the effect of Section 17-2d, *Transcript*, pp. 18-19, 48, and that in some instances, economic pressure is placed upon persons to leave the State.[11]

A prior effort by a State to interfere with the movement of indigent persons across its borders was found to be constitutionally repugnant. In *Edwards* v. *California*, 314 U.S.

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[11] Although the Connecticut Welfare Department offers temporary assistance to persons ineligible for AFDC for a maximum of 60 days, it discontinues such assistance *immediately* if the person refuses voluntary return to the place of last residence. The Connecticut Welfare Manual provides that "if after a reasonable period of counselling, the family is unable to develop plans for self-support, arrangements for return [to be] undertaken immediately and . . . completed within sixty days. If the family does not wish to return, assistance will be discontinued *even though* the sixty day maximum period that temporary assistance may be given has not elapsed." Connecticut Welfare Manual, Vol. I, Ch. II, § 219.3; Appendix to Plaintiff's Pretrial Memorandum in District Court, p. 5.

160, 171 (1941), the Court struck down a law making it a misdemeanor to bring "into the State any indigent person who is not a resident of the State, knowing him to be an indigent person. . . ." The Court, although divided on the constitutional theory to be applied, unanimously concluded that the statute was invalid because it restricted the freedom of indigents to move from other States into California.

Edwards v. *California* should control the decision here. As in this case, the State legislation that impeded freedom of travel in *Edwards* was aimed at indigent persons seeking a better life by moving to a new community for the purpose of establishing residence therein. In addition, similar to the position which Connecticut takes in this case, California attempted to justify its statute by drawing attention to the staggering "problems of health, morals and especially finance," caused by a "huge influx of migrants. . . ."[12] 314 U.S. at 173. Just as the circumstances in *Edwards* parallel those here, so also is the philosophy underlying the opinions in that case instructive regarding the invalidity of this Connecticut statute. This philosophy is that the individual states cannot, under our constitutional scheme, isolate themselves from the impact of problems common to all. If the states are to be free to prevent persons without funds from entering their jurisdiction, the nation as a whole no longer will be an operative unit in

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[12] Statistics kept by the State Welfare Department for the twelve month period from Oct. 1, 1961 to Oct. 1, 1962, reflect that the migration of indigents to Connecticut is not a "staggering" problem. Out of a total number of 19,596 applications for public assistance during that period only 379 or 1.9% had resided in the State for less than one year. Transcript, p. 53.

coping with economic and social concerns that plainly know no borders. It will achieve what Justice Frankfurter warned against in *New York* v. *O'Neill*, 359 U.S. 1, 8 (1959), the "Balkanization of the Nation." It will, moreover, in the words of Justice Douglas,

> ". . . introduce a caste system utterly incompatible with the spirit of our system of government. It would permit those who were stigmatized by a State as indigents, paupers, or vagabonds to be relegated to an inferior class of citizenship. It would prevent a citizen because he was poor from seeking new horizons in other States. It might thus withhold from large segments of our people that mobility which is basic to any guarantee of freedom of opportunity." *Edwards* v. *California, supra*, 314 U.S. at 181.

The appellant would distinguish *Edwards* from the instant case on the ground that a criminal statute was in issue in that case. *Brief for Appellant*, pp. 13-16. The argument continues, apparently, that because of this fact, indigents were stopped from moving into California and, therefore, there was a prohibition of the exercise of the right to travel which is not similarly caused by Section 17-2d because it does not prescribe criminal sanctions. An initial flaw in this argument, as recognized by the court below, is that the California statute "penalized the sponsor of the indigent, not the indigent himself." *Thompson* v. *Shapiro*, 270 F. Supp. 331, 336 (1967); no sanctions were applied directly against the indigent.

Further support for the district court's holding that Section 17-2d "impedes" the right to travel because it

"discourages" [13] indigent persons from coming to Connecticut, is found in *United States* v. *Guest, supra.* The district court interpreted the use of the words "impede" and "oppress" in Justice Stewart's opinion for the Court[14] to mean that the right to travel is abridged by conduct amounting to less than an absolute prohibition on the exercise of the right. This interpretation is confirmed by Justice Harlan's concurring opinion in *Guest,* in which he states that the right to travel is "free from unreasonable *governmental* interference." 383 U.S. at 763.

The interference with the right to travel caused by Section 17-2d is further highlighted by reference to the "express purpose" for which the statute was passed. See *Edwards* v. *California, supra* at 174. Based on the characterization placed on the statute by the appellant, the district court held that the purpose of Section 17-2d is "to protect [the State's] fisc by discouraging entry of those who come needing relief." [15] 270 F. Supp. at 336-37. The

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[13] The right to travel has been analogized in the Passport Cases, *Kent* v. *Dulles,* 357 U.S. 116, 125-26 (1958), *Aptheker* v. *Secretary of State,* 378 U.S. 500, 505-06 (1964), to those rights protected by the first amendment, and it is in this context that Section 17-2d can be said to be unconstitutional because it "has a chilling effect on the right to travel." 270 F. Supp. at 336. See *Dombrowski* v. *Pfister,* 380 U.S. 479, 487 (1965).

[14] "[I]f the predominant purpose of the conspiracy is to *impede* or prevent the exercise of the right of interstate travel, or to *oppress* a person because of his exercise of that right, then, . . . the conspiracy becomes a proper object of the federal law under which the indictment in this case was brought." 383 U.S. at 760 (Emphasis added).

[15] We maintain that contrary to what California and Iowa contend in their amicus briefs filed in this case, the only purpose which an AFDC residence law serves is to deter indigents from taking up residence in the State. Statistics show that the percentage of applicants for AFDC who have resided in a state for less than

legislative history of the statute leaves no room for doubt that this was in fact the objective of the statute. The pertinent part of that history is contained in the statement on the floor of the Connecticut General Assembly by Representative Morris Cohen, the draftsman of Section 17-2d as he moved for its adoption. After acknowledging that few people come to Connecticut specifically to get public assistance and that most persons who come are from depressed areas and desire to better themselves, he said:

> "If we pass this [one year residency] Bill, the word could get around that we are not an easy state . . . . As responsible legislators we cannot . . . continue to allow unlimited migration into the State, on the basis of offering instant money and permanent income to all who can make their way [here], regardless of their ability to contribute to the economy." Connecticut General Assembly 1965, *House of Representatives Proceedings*, Vol. II, Part 7, pp. 194-95 (Connecticut State Library); *Appendix to Plaintiff's Pretrial Memorandum in District Court*, pp. 78-80.

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one year is negligible (less than 2% in Connecticut for 1961-1962, *see* footnote 12 *supra;* approximately 2% in N. Y. for 1955, *see* Residence Laws: Road Blocks to Human Welfare 20 (National Travelers Aid Ass'n., 1956)) and that the cost of administering the law may exceed the dollar amount saved by withholding benefits. One Manner of Law: A Handbook on Residence Requirements in Public Assistance 6 (National Travelers Aid Ass'n, 1961); *Hearings on HR10032 Before the House Comm. on Ways and Means*, 87th Cong., 2nd Sess. 88 (1962). Furthermore, as to other groups of new beneficiaries, such as children born to parents already on AFDC, California and Iowa as well as all other states having residence laws, provide for their immediate eligibility even though the drain on the budget is as *unpredictable* as in the case of indigent newcomers.

The deterrent purpose of Section 17-2d must be viewed in the light of the history of earlier Connecticut legislation dealing with newly arrived indigents. A statute in force until 1963 provided for the physical removal of welfare applicants from Connecticut to another state to which they belonged after a finding by the Commissioner of Welfare and a court warrant ordering an officer to transport such person. *Conn. Gen. Stat.*, § 17-273a (1961). The Welfare Commissioner sought a determination of the constitutionality of this statute, but the Connecticut Supreme Court refused to rule on the issue. *State* v. *Doe*, 149 Conn. 216, 231, 178 A. 2d 271, 278 (1962). Although the law was subsequently repealed, 1963 Public Act 501, § 4, its purposes—and particularly its draconian remedy—illuminate the similar objectives of Section 17-2d. See 37 Conn. B. J. 504 (1963).

It was made explicit in *Edwards* v. *California* that a state statute which is *intended* to deny indigents the right to travel is patently invalid.[16] Relying on Justice Cardozo's

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[16] The issues raised here might differ if the challenged State statute had been enacted to accomplish some purpose other than impairment of the right to travel. For example, where residence laws are adopted, not to discourage travel, but to assure sufficient local familiarity to qualify for State regulated occupations like the practice of law, the issue becomes whether the legitimate State purpose is lawful notwithstanding the possible deterrence to travel. Compare *Dent* v. *W. Va.*, 129 U.S. 114 (1889) with *Mercer* v. *Hemmings*, 194 So. 2d 579, 584-86 (Fla. 1966). But this Connecticut statute has no other purpose except to deter travel (saving State funds is simply the reason why Connecticut has enacted a statute whose purpose is to deter travel). Furthermore, no other State privilege conditioned by a residence law is as integrally related to the act of traveling to a new State for the purpose of becoming a resident, as the availability of AFDC is to a person who is poor. See *Green* v. *Dept. of Public Welfare*, 270 F. Supp. 173, 178 (D. Del. 1967).

statement for a unanimous Court in *Baldwin* v. *Seelig*, 294 U.S. 511, 523 (1935); that the Constitution "was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division," the Court concluded that no State can "isolate itself from difficulties common to all" States by denying entry to indigent persons. 314 U.S. at 173. It then went on to say regarding the California statute:

> "It is difficult to conceive of a statute more squarely in conflict with this theory than the Section challenged here. Its *express purpose* and inevitable effect is to prohibit the transportation of indigent persons across the California border." 314 U.S. at 174 (Emphasis added).

Connecticut argues, however, that regardless of the obvious purpose and effect of Section 17-2d, it is a valid statute because it represents a legitimate determination by Connecticut as to how it will spend its tax revenues. *Brief for Appellant*, pp. 16-17. The contention is made that the federal courts cannot tell the States how they shall spend their monies. While this argument has some validity on the issue of *whether* a State will spend its money, it contains the entirely unsupportable implication that there are no constitutional limitations on the way that a State can administer a service or benefit which it gratuitously makes available to its citizens. While we do not argue that Connecticut has a constitutional obligation to spend its monies to provide AFDC to its needy residents, we maintain that it is well settled that where it does choose to spend its monies in this way, it must do so in compli-

ance with the fourteenth amendment.[17] See *Griffin* v. *Illinois*, 351 U.S. 12, 18 (1956).. Furthermore, this same argument, that the statute is justified because of the demands which indigent newcomers would otherwise make on the treasury was made by California and rejected by the Court in *Edwards*.[18] This same conclusion has recently been reiterated by Judge Seitz, speaking for a unanimous three-judge district court that struck down the Delaware one year residence requirement for AFDC:

> "[The principal purpose of the Delaware statute] as suggested by defendant's counsel, is the State's desire to discourage needy persons from entering Delaware and thereby to protect the public purse . . . . Edwards v. People of State of California, 314 U.S. 160, 62 S.Ct. 164, 86 L.Ed. 119 (1941), although in-

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[17] The district court in effect answered Connecticut's contention that the appellee's claim for relief is really based on the proposition that she has a constitutionally protected right to AFDC, *Brief for Appellant*, p. 8, by saying that "the State may provide assistance in a limited form with restrictions, so long as the restrictions are not arbitrary; but, in any case where the government confers advantages on some, it must justify its denial to others by reference to a constitutionally recognized reason," 270 F. Supp. at 338.

[18] California's position was that:

> "Their coming here has alarmingly increased our taxes and the cost of welfare outlays . . . . Naturally, when these people can live on relief in California better than they can by working in Mississippi, Arkansas, Texas or Oklahoma, they will continue to come to this State." 314 U.S. at 168.

The Court responded to this contention as follows:

> "The State asserts that the huge influx of migrants into California in recent years has resulted in problems of . . . finance, the proportions of which are staggering. It is not for us to say that this is not true . . . . But this does not mean that there are no boundaries to the permissible area of State legislative activity. There are." 314 U.S. at 173.

volving a different form of state action and different constitutional provisions, stamps such a ground as a constitutionally impermissible basis for separate state treatment . . . . The protection of the public purse, no matter how worthy in the abstract, is not a permissible basis for differentiating between persons who otherwise possess the same status in their relationship to the State of Delaware." *Green* v. *Dept. of Public Welfare, supra,* 270 F. Supp. at 177.

II.

Section 17-2d Violates the Fourteenth Amendment Because It Abridges the Right to Establish Residence in Connecticut.

The holding by the lower court that Section 17-2d is constitutionally invalid because it interferes with the "right to establish residence in Connecticut," 270 F. Supp. at 336, reflects an application of the opinions of this Court going back to 1825. In that year, Justice Washington, writing for the court in *Corfield* v. *Coryell, supra,* 4 Wash. C.C. at 380-81, made the classic and oft-quoted statement that "it is the right of a citizen of one state to pass through or to *reside* in any other state, for purposes of trade, agriculture, professional pursuits or otherwise . . . . " (Emphasis added.)

Section 17-2d abridges the right of persons subject to the act to establish residence in Connecticut because it *discriminatorily* withholds from such persons a benefit which is essential to minimal residence. See generally, Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues,* 74 Yale L. J. 1245, 1253 (1965). AFDC

is denied these persons even though they are poor enough to qualify for such assistance, and like the appellee, are bona fide residents of the State.[19] As to those persons who choose to remain in Connecticut, it in effect makes the right to enjoy residence meaningless because it forces on them a life devoid of any humane quality[20] solely because of their having chosen Connecticut as a place to reside. We wish to make it clear that this claimed constitutional violation is not the failure of the State to "equalize economic conditions" for all its citizens, *Griffin* v. *Illinois, supra,* U.S. at 23 (Frankfurter, J., concurring), but rather the discriminatory withholding of a State offered benefit which is essential to meaningful residence. As stated by the lower court, "denying to the plaintiff [this] gratuitous benefit . . . impedes the exercise of [the right to establish residence]. See *Sher-*

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[19] Pursuant to stipulation No. 2 (A. 39a), the appellant admits that the appellee is a bona fide resident of Connecticut. She is also a resident within the definition of that term as contained in the State Welfare Manual: "Residence within the state shall mean that the applicant is living in an established place of abode and the plan is to remain." Conn. Welfare Manual, Vol. 1, Ch. II, § 220; Appendix to Plaintiff's Pre-Trial Memorandum in District Court, p. 8. Furthermore, Connecticut is her legal domicile as that term has been defined by the Connecticut Supreme Court: "[A person's domicile is that place] in which he has voluntarily fixed his habitation . . . with the present intention of making it his home, unless or until something which is uncertain or unexpected shall happen to induce him to adopt some other permanent home." *Mills* v. *Mills,* 119 Conn. 612, 617, 179 Atl. 5, 7 (1935).

[20] One noted social commentator has described the qualitative effect which the durational residence law has on the indigent resident subject to it in the following terms: "These persons, are, in practical fact second-class citizens to the effect that measures of common protection, established as socially necessary for others living in the community, are not available to them." Wickenden, *The Social Cost of Residence Laws,* Social Casework, Vol. 37 (1956).

bert v. *Verner*, 374 U.S. 398, 405-06, 83 S.Ct. 1790, 10 L.Ed. 2d 965 (1963)." 270 F. Supp. at 336. See 42 Conn. B. J. 114, 119 (1968).

The denial of AFDC to persons subject to Section 17-2d forces them to live under the most deprived conditions until the year is up. The effect which a year without AFDC can have on a person otherwise without resources is intolerable. As stated by the district court in *Harrell* v. *Washington*, Civil No. 1497-67, p. 12 (D.D.C. 1967), *appeal docketed*, No. 1134, U.S. March 4, 1968, "the spread over a year's time of the evils which public assistance seeks to combat may mean that aid, when it becomes available, will be too late . . . ." When translated into human statistics, the impact becomes even more apparent. Three out of every four AFDC recipients are children; out of the total 4.8 million persons receiving AFDC, less than 70,000 are fathers who are not physically or mentally incapacitated. *Report of National Advisory Comm'n on Civil Disorders*, p. 457 (1968). It is apparent from these statistics that as to indigent persons who turn to AFDC for help, residence, in the most basic sense of the enjoyment of the right to reside in a State, is at stake.

The right asserted in this section of the brief is explicitly protected by that portion of Section 1 of the Fourteenth Amendment which reads, "all persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens . . . of the state wherein they reside . . . ." The meaning of this section was discussed at length by Justice Miller writing for the court in the *Slaughter House Cases*, 16 Wall. 36, 80 (1872) and interpreted to mean "that a citizen of the United States can, of his own volition become a citizen of any State of the Union by a *bona fide*

residence therein, *with the same rights as other citizens of that State.*" (Emphasis added.) This same meaning was attributed to Section 1 by Justice Jackson in his concurring opinion in *Edwards,* but with the added clarification that this right is an attribute of national citizenship.

> "[I]t is a privilege of citizenship of the United States, protected from state abridgement, to enter any state of the Union, either for temporary sojourn or for the establishment of permanent residence therein and for gaining resultant citizenship thereof. If national citizenship means less than this, it means nothing.
>
> "State citizenship . . . results only from residence and is gained or lost therewith. That choice of residence was subject to local approval is contrary to the inescapable implications of the westward movement of our civilization." 314 U.S. at 183.

This Court has recognized that the denial of rights by a State to one class of persons which are made available to other persons similarly situated, constitutes an interference with the constitutionally protected right to enjoy residence in a State. In *Truax* v. *Raich,* 239 U.S. 33 (1915), an Arizona statute which limited the number of jobs which could be made available to alien residents of the State was declared unconstitutional. Justice Hughes, writing for the court, found that the effect of the statute was to interfere with the enjoyment of residence:

> "The assertion of an authority to deny to aliens the opportunity of earning a livelihood when lawfully admitted to the State would be tantamount to the assertion of the right to deny them entrance and *abode,*

for in ordinary cases they cannot live where they cannot work. And, if such a policy were permissible, the practical result would be that those lawfully admitted to the country . . . would be segregated in such of the States as chose to offer hospitality." 239 U.S. at 42 (Emphasis added).

In *Oyama* v. *California,* 332 U.S. 633, 640 (1948), the court held that California's Alien Land Law, which operated to escheat two parcels of land purchased by an alien in the name of his son, an American citizen and California resident, was unconstitutional because it deprived the son of "the equal protection of [the] laws and *of his privileges as an American citizen.*" (Emphasis added) The majority opinion found the law objectionable because it relegated one class of residents to an inferior quality of citizenship. This right was confirmed again in *Takahashi* v. *Fish Comm'n,* 334 U.S. 410, 420 (1948) where the court referred to the right of "all persons lawfully in this country [to] *abide* 'in any state' on an equality of legal privileges with all citizens under *non-discriminatory laws.*" (Emphasis added).

The application of these principles to the one year residence requirement should be obvious. Individuals deprived of AFDC are being denied more than the employment at issue in the *Truax* and *Takahashi* cases, and more than the land in *Oyama.* They are being denied the minimal necessities of life that, apart from the effect of the residence requirement, they would receive as residents of the State.

III.

Section 17-2d Violates the Equal Protection Clause Because It Discriminates Against Persons on the Basis of Their Wealth.

Section 17-2d does not bar all persons from receiving AFDC within one year from the date of arrival in Connecticut. Instead, it bars only those who come into the State "without visible means of support for the immediate future." As characterized by the district court, it draws a "classification . . . based . . . solely on indigency." 270 F. Supp. at 337. The "immediate future" is interpreted by the Connecticut Welfare Manual to mean a period of three months, and "without visible means of support" is interpreted to include:

> "1. Persons or families who arrive in Connecticut without specific employment.
>
> "2. Those arriving without regular income or resources sufficient to enable the family to be self-supporting in accordance with Standards of Public Assistance."[21] *Connecticut Welfare Manual*, Vol. 1, Ch.

[21] The regulations further provide:

(1) If the application for assistance is filed within one year after arrival in Connecticut, the applicant must establish that he was self-supporting upon arrival and for the succeeding three months thereafter; or

(2) If the application for assistance is filed within one year after arrival in Connecticut, the applicant must clearly establish that he came to Connecticut with a bona fide job offer; or

(3) If the application for assistance is filed within one year after arrival in Connecticut, the applicant must establish that he sought employment and had sufficient resources to sustain his family for the period during which a person with his skill would normally be without employment while actively seeking work. Personal re-

II, § 219.1; Appendix to Plaintiff's Pre-Trial Memorandum in District Court, p. 3.

In addition, a Note to section 219.1 of the Welfare Manual provides that "Support from relatives or friends, or from a public, private, or voluntary agency for three months after arrival will not satisfy the requirements of the law, which relates to self-support rather than to dependency."

The net effect of these provisions is to discriminate against persons arriving in Connecticut without resources as against those who arrive with resources. Persons in the latter category, if they develop the need for AFDC after three months, are eligible to receive such aid even if they have squandered or otherwise dissipated their initial resources. But persons who arrive without resources are prohibited from receiving AFDC although they are otherwise eligible for assistance. In this connection, it is undeniable that a job offer is a "resource."

Making reference to Connecticut's work training program administered under the Economic Opportunity Act, 42 U.S.C. § 2921-2925 (1964) as amended, 42 U.S.C. § 2921-2925 (1968), Connecticut argues that the appellee would have been eligible for public assistance despite Section 17-2d if she had evidenced a desire to be trained for employment.[22] The State goes on that her "claim of unavaila-

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sources to sustain his family for a period of three months is considered sufficient. Those who come to Connecticut for seasonal employment such as work in tobacco or short term farming are not deemed to have moved with the intent of establishing residence in Connecticut.

Connecticut Welfare Manual, Vol. 1, Ch. II, § 219.2; Appendix to Plaintiff's Pre-Trial Memorandum in District Court, p. 4.

[22] The State's contention that persons who have resided in the State for longer than one year are given AFDC because they

bility to work because of the age of her children . . . failed to satisfy the appellant." *Brief for Appellant*, p. 5. This is simply not so. The record establishes that the appellee was not "employable or trainable at the time" that she applied for assistance because she was pregnant and had to take care of her minor son. (A. 41a, Stip. 27)[23] Moreover, the "notice of action" forwarded by the State Welfare Department to the appellee advising her that her application for AFDC was denied stated as the reason, her failure to satisfy the requirements of Section 17-2d. The record further establishes that the appellee does have the desire to be trained for employment. (A. 44a, Stip. 48).

By discriminating in the way that it does solely on the basis of individual wealth, the Connecticut statute is plainly invalid under a familiar line of decisions of this Court. Justice Robert Jackson, concurring in *Edwards* v. *California, supra*, 314 U.S. at 184-85, foreshadowed these decisions by asserting that "the mere state of being without funds is a neutral fact—constitutionally an irrelevance, like race, creed, or color." Subsequently, starting in 1956, this principle has been applied to strike down a variety

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"have contributed to the economy or demonstrated a willingness to do so," Brief for Appellant, p. 18, belies the language of Section 17-85, which makes financial need the only prerequisite for eligibility for AFDC. Furthermore, the unsupportable nature of the State's argument, that eligibility for AFDC is based on either employability or willingness to be trained for employment, is evidenced by the fact that when the appellee's one year waiting period had expired, she was immediately eligible for assistance without conditions attached.

[23] The impracticality of placing mothers with pre-school age children in a job or a work training program was highlighted by the Commissioner of Welfare in his testimony before the lower court. Transcript, pp. 39, 45-6, 64.

of State laws that were found to have an impermissible unequal impact on the poor.

In *Griffin* v. *Illinois, supra,* 351 U.S. 12, it was held that Illinois was required to provide indigents with trial transcripts because State law required such a transcript for all appellate review and furnished them to persons who paid a fee. Mr. Justice Black, speaking for four Justices, stated that "there can be no equal justice where the kind of trial a man gets depends on the amount of money he has." 351 U.S. at 19. Later cases applied the *Griffin* rationale to require states to waive filing fees whenever the fees would deny poor persons a hearing available to those able to pay. E.g., *Burns* v. *Ohio,* 360 U.S. 525 (1959) (criminal appeals); *Smith* v. *Bennett,* 365 U.S. 708 (1961) (habeas corpus). The doctrine has also been applied to require the States to provide indigents with certain services, such as legal representation, which those with funds can afford privately. *Douglas* v. *California,* 372 U.S. 353 (1963). In addition, the Court has declared the poll tax unconstitutional because it excluded from voting "those unable to pay a fee." *Harper* v. *Virginia Bd. of Elections,* 383 U.S. 663, 668 (1966).

The instant case presents an even clearer occasion for the application of the equal protection clause than any of the above decisions. In these earlier cases State legislation was invalidated as embodying an "invidious discrimination" because the Court concluded that the *effect* of the statutes was to deny poor persons certain privileges that wealthier persons could afford. In the case at bar, however, there is no need to speculate about the precise impact of the State law on persons without means or about whether the impact is of such a nature as to render it

unconstitutional. These questions often raise difficult theoretical and practical problems. See Note, *Discriminations Against the Poor and the Fourteenth Amendment*, 81 Harv. L. Rev. 435 (1967). Here these questions can be put to one side because the State is *explicitly* discriminating against persons without economic resources. Accordingly, the legislation is invalid under the most fundamental principles of equal protection. As stated by Justice Harlan, dissenting in *Douglas* v. *California, supra*, 372 U.S. at 361:

> "The States, of course, are prohibited by the Equal Protection Clause from discriminating between 'rich' and 'poor' *as such* in the formulation and application of their laws."

Section 17-2d falls squarely within Justice Harlan's formulation. The statute uses the phrase "visible means of support" as the pertinent criterion, and the implementing regulations spell out the meaning of the phrase in strictly economic terms. Applications for AFDC of otherwise eligible persons who have resided in Connecticut for less than one year are granted only if the applicant, at the time of arriving in the State, had "specific employment" or sufficient "regular income or resources." This is discrimination between rich and poor "as such," and it therefore cannot stand under the fourteenth amendment.

IV.

Section 17-2d Violates the Equal Protection Clause Because Its Classification Is Unreasonable in Light of the Statutory Purpose.

It is established that legislative classifications, to survive scrutiny under the Equal Protection Clause, must be reasonably related to the purpose of the statute. As early as 1896, in *Gulf, Colorado & Santa Fe Ry.* v. *Ellis,* 165 U.S. 150, 155, the court expressed this requirement as follows:

> "[T]he attempted classification . . . must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis."

This standard has consistently been adhered to. As stated in *McLaughlin* v. *Florida,* 379 U.S. 184, 191 (1964), "the question [is] whether the classifications drawn in a statute are reasonable in light of its purpose . . . ." Or, as laid down in *Truax* v. *Raich, supra,* 239 U.S. at 42, "reasonable classification implies action consistent with the legitimate interests of the State . . . ." See also *Carrington* v. *Rash,* 380 U.S. 89, 93 (1965); *Rinaldi* v. *Yeager,* 384 U.S. 305, 308-309 (1966).

In the case at bar the "act in respect to which the classification is proposed," is Section 17-85 of Chapter 302 of the Connecticut General Statutes. It provides that assistance will be given under the Connecticut AFDC program to "any relative having a dependent child or dependent

children, who is unable to furnish suitable support therefor. . . ." Under both Sections 17-85 and 17-2d applicants must also be residents of Connecticut.[24] Accordingly, the statute establishes an AFDC welfare program which is designed to provide assistance to residents of the State who need such assistance.

It is evident that the one year durational residence requirement does not comport with the stated purpose of the AFDC program. It fails to provide the "suitable support" to families with dependent children that Section 17-85 mandates as the legislative objective. In fact, it is inconsistent with this purpose. Residents of Connecticut who have lived in the State for less than one year are no less needy by reason of that fact. As stated by the court in *Harrell* v. *Washington, supra* at p. 12:

> "The basic purposes of the legislation—public assistance to those in need, maintenance and strengthening of family life, achievement of self-support and self-care—are not more faithfully served by withholding aid until applicants have lived here for twelve months. Indeed, the denial of assistance for an entire year to otherwise qualified recipients may only erode values which the statute tries to promote."

The court in *Green* v. *Dept. of Public Welfare, supra,* 270 F. Supp. at 177, also recognized the obvious consequences of denying aid to indigent residents who have lived in the State for less than a year. In ruling that "discrimination based on length of residency . . . finds no constitutional justification in the purpose declared in the statute itself,"

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[24] See footnote 19, *supra.*

the court pointed out that it is not "an acceptable answer to say that until they are here one year such persons are not a part of the State's needy and distressed," and it concluded that such discrimination "necessarily results in pressure on the solidarity of the family unit"—which, after all, it is the purpose of programs for aid to families with dependent children to assure. See, e.g., Bell, AID TO DEPENDENT CHILDREN (1965).

The inconsistency between the legislative objective and the durational residence requirement also exists with respect to the Connecticut law. Here, too, bona fide residents of the State are denied needed assistance on a ground that cannot be squared with any of the humane purposes of the statute. The fact that Connecticut confines the residence requirement to newcomers who arrive without a job or financial resources merely adds another element of discrimination against the poorest of the poor accentuating the invalidity of the legislation.

There is no other valid purpose which can be advanced to support the one year provision. As discussed in Point I, *supra*, it is not a proper object for Connecticut to try to deter indigents from entering the State. Nor is there any basis upon which the residence requirement can be justified as a means of ascertaining the facts concerning eligibility for AFDC and to avoid payments tainted with fraud. Not only did the court below find that appellee came to Connecticut with a perfectly lawful purpose—"to live near her mother," 270 F. Supp. at 333,—but the Connecticut Welfare Commissioner "frankly testified that no residence requirement is needed for any of these purposes." 270 F. Supp. at 338.

Finally, the State cannot justify Section 17-2d by claiming that its sole objective is to preserve State funds. In the first place, this goal is not divisible from the general purpose to save funds *by deterring indigents from entering Connecticut.* Second, even assuming that it was, the statute would be invalid because there is no basis in the record for concluding that treasury funds will in fact be saved by drawing the line the way Connecticut has drawn it—between applicants with jobs or those resident for one year, on the one hand, and newcomers without jobs on the other.

As stated by the court below, "the classifications of one year's residence or a job are not reasonable in light of the purpose of §17-2d because . . . there is no showing that those applicants will be lesser burdens than applicants without jobs or one year's residence." 270 F. Supp. at 338.

The district court was on sound ground in requiring Connecticut to make a "showing" on this issue. The seriousness of the individual interest at stake alone justifies this conclusion. In addition, the financial and statistical data is in the possession of the State. Finally, the Commissioner of Welfare conceded at the district court hearing that the proportion of persons coming to Connecticut for the single purpose of obtaining AFDC is small, *Transcript*, pp. 42-3, and this testimony is bolstered by similar evidence introduced with respect to the Pennsylvania experience. See *Smith* v. *Reynolds*, 277 F. Supp. 65, 66 (E.D. Pa. 1967). In this context it would have been error for the lower court to place the burden of proof on the appellee. Compare *Skinner* v. *Oklahoma*, 316 U.S. 535, 541-42 (1942); *Tot* v. *United States*, 319 U.S. 463, 467 (1943).

Finally, even if the state were somehow able to make a showing of financial benefit, this would not be sufficient to satisfy the demands of the Equal Protection Clause. The protection the Constitution affords to the victims of arbitrary discrimination is surely greater than that. In *Smith* v. *Reynolds, supra,* it was also maintained that reasons of economy were sufficient to uphold Pennsylvania's one year residence requirement. The court rejected this argument as follows:

> "But the constitutional test of equal protection is not satisfied by considerations of minimal financial expediency alone . . . . There must be some otherwise legitimate purpose for excluding members of the class who are in fact deprived of the protection and privileges of existing laws." 277 F. Supp. at 68.

This Court, too, in an analogous context, has recognized the futility of justifying essentially unequal treatment by a less than compelling State interest. In *Carrington* v. *Rash, supra,* Texas attempted to sustain a permanent ban on voting by members of the armed forces because of the difficulty of determining which members intended to become permanent residents of the State. In rejecting Texas's defense, Mr. Justice Stewart said, "States may not casually deprive a class of individuals of the vote because of some remote administrative benefit to the State." 380 U.S. at 96. Just as the right to vote cannot be abridged because of a "remote administrative benefit," so too destitute families cannot be deprived of the necessities of life "by considerations of minimal financial expediency." See also *Oyama* v. *California, supra,* 332 U.S. at 646-647.

In sum, irrespective of the view one takes of the purpose of the legislation, Section 17-2d is invalid under the Four-

teenth Amendment because the classification it draws is unreasonable in light of the statutory purpose.

Conclusion

For the reasons stated, the judgment of the court below should be affirmed.

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APPENDIX A

Constitutional Provisions and Statutes Involved

U.S. Const., Amendment XIV, Section 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Connecticut General Statutes, Section 17-85 (1966):

"Any relative having a dependent child or dependent children, who is unable to furnish suitable support therefor in his own home, shall be eligible to apply for and receive the aid authorized by this part, for such dependent child or children and to meet such relative's own needs, if such applicant has not made an assignment or transfer or other disposition of property without reasonable consideration or for the purpose of qualifying for an award if such relative is to be supported wholly or in part under the provisions of this part; provided ineligibility because of such disposition shall continue only for that period of time from the date of disposition over which the fair value of such property, together with all other income and resources, would furnish support on a reasonable standard of health and decency; and provided no needy dependent child shall be deemed ineligible for assistance by reason of any such transfer or other disposition of property by a relative not legally liable for

the support of such child. Each such dependent child shall be supported in a home in this state, suitable for his upbringing, which such relative maintains as his own. Aid shall not be denied any such dependent child on the ground that such relative is not a citizen of this state or of the United States. In the case of a child who reaches his eighteenth birthday during a school year and while in attendance at school, such aid shall continue for such child, so long as he attends school, until the end of such school year."

Connecticut General Statutes, Section 17-2d (1966):

"When any person comes into this state without visible means of support for the immediate future and applies for aid to dependent children under Chapter 301 (sic.) or general assistance under Part I of Chapter 308 within one year from his arrival, such person shall be eligible only for temporary aid or care until arrangements are made for his return. . . ."

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. [redacted] 33

WALTER E. WASHINGTON, *et al.*,

Appellants,

v.

MINNIE HARRELL, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEES

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 1134

WALTER E. WASHINGTON, *et al.*,

Appellants,

v.

MINNIE HARRELL, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEES

Opinions Below

The opinions of the district court (A. 56-71, 71-87) are reported at 279 F.Supp. 22.[1]

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[1] The opinion reported at 279 F.Supp. 22 is captioned *Harrell, et al.* v. *Tobriner, et al.* After the opinion was filed, the parties moved, pursuant to Rule 25 (d)(1), Federal Rules of Civil Procedure, to substitute as party defendant Walter E. Washington for Walter N. Tobriner. The motion was granted in an order filed on November 28, 1967.

Jurisdiction

The decree of the three-judge district court declaring unconstitutional District of Columbia Code, §§3-203(a) and (b) and District of Columbia Department of Public Welfare Handbook of Public Assistance, EL 9.1, III, B, 3, and permanently enjoining their enforcement was entered on November 26, 1967. Notices of appeal were filed on December 22, 1967, and probable jursdiction was noted on March 4, 1968. The jurisdiction of this Court is conferred by 28 U.S.C. 1253 which provides for direct appeals from decisions of three-judge district courts.

Constitutional and Statutory Provisions Involved

The Fifth Amendment to the Constitution of the United States provides in pertinent part that:

> No person shall . . . be deprived of life, liberty, or property, without due process of law; . . .

D. C. Code, §3-203, provides in pertinent part that:

> Public assistance shall be awarded to or on behalf of any needy individual who either (a) has resided in the District for one year immediately preceding the date of filing his application for such assistance; or (b) who was born within one year immediately preceding the application for such aid, if the parent or other relative with whom the child is living has resided in the District for one year immediately preceding the birth; . . . .

Question Presented

Whether the provisions of D. C. Code, §3-203 which preclude the awarding of public assistance to persons who have not resided in the District of Columbia for one year immediately preceding the date of filing an application for assistance violate the Constitution of the United States.

Statement

A. The Pleadings and Procedure

These proceedings were commenced on June 12, 1967, when appellee Minnie Harrell[2] filed a complaint[3] in the United States District Court for the District of Columbia requesting that appellants be permanently enjoined from enforcing the provisions of the District of Columbia Code, §3-203. That statute provides that a person must be a resident of the District of Columbia for one year as a condition for applying for or obtaining Aid to Families with Dependent Children (AFDC), Aid to the Blind (AB), Aid to Permanently and Totally Disabled (APTD) or General Public Assistance (GPA).[4] The complaint alleged that to

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[2] On April 2, 1968, Mrs. Harrell died. On April 5, 1968, counsel for appellees filed in this Court a paper entitled "A Suggestion of Death and Motion to List the Name of Clay Mae Legrant in Place of the Name of Minnie Harrell in the Caption of the Above-Entitled Case".

[3] An amended complaint was filed on August 1, 1967 (A. 4).

[4] The requirement in D.C. Code, §3-203, that a person shall not be eligible for Old Age Assistance (OAA) unless he has resided in the District of Columbia for five years or more within the nine years immediately preceding the application for such assistance and has resided continuously in the District for one year immediately preceding the application, is not involved in this litigation. A similar

classify needy residents of the District of Columbia and their children on the basis of whether they have lived in the District more than one year, and to refuse to process the applications of those who have lived here less than one year solely for that reason is to classify arbitrarily in violation of equal protection of the laws guaranteed by the Fifth Amendment (A. 10). On June 20, 1967, and July 7, 1967, appellees Barley and Brown, respectively, filed complaints requesting similar relief (A. 18, 32). In all three cases appellees requested preliminary injunctions (A. 1, 15, 29).

On July 26, 1967, an order was entered consolidating the *Barley* and *Brown* cases with the *Harrell* case for all future action. Pursuant to a request for the appointment of a three judge district court, the Chief Judge of the Court of Appeals designated the judges to serve on that court on July 31, 1967. Following the filing of appellants' motion to dismiss or for summary judgment (A. 54) and appellees' counter-motion for summary judgment (A. 55), a hearing was held on September 7, 1967.[5] On September 11, 1967, the court below enjoined appellants *pendente lite* from denying public assistance to appellees because of their failure to meet the one-year durational residence requirement (A. 50).[6]

OAA residence requirement of the State of Arizona is currently under attack in *Porter* v. *Graham*, No. Civ.-2348 Tucson (D. Ariz. 1968). An order preliminarily enjoining enforcement of section 46-252 of the Arizona Revised Statutes (the OAA provision) was entered on January 24, 1968.

[5] On August 21, 1967, the motion of appellee Clay Mae Legrant for leave to intervene as a party plaintiff in the *Harrell* and *Brown* cases was granted. The intervenor's complaint (A. 42) was filed on September 15, 1967.

[6] On October 16, 1967, the court below entered an order permitting the suits to be maintained as class actions (A. 3).

In an opinion entered on November 8, 1967, the court below ruled unconstitutional the durational residence requirement and ordered the parties to seek agreement on the form of judgment (A. 56). The decree was entered on November 28, 1967 (A. 88) and a notice of appeal to this Court was filed on December 22, 1967.

B. The Appellees

1. *Minnie Harrell*

Before moving to the District of Columbia with her three children in September 1966, appellee Harrell resided in Suffolk County, New York (A. 7). She had been receiving AFDC on behalf of her three children since being separated from her husband in April 1966 (A. 7). Becoming ill with cancer, she decided to come to Washington so that in case of hospitalization her children could be cared for by her brother and sister, both of whom live in Washington.[7]

In December 1966, Mrs. Harrell was informally advised by the District of Columbia Department of Public Welfare that she and her children would be ineligible for assistance until they had lived in Washington for one continuous year (A. 8). In May 1967, she formally applied for public assistance and received a written rejection on the ground

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[7] See appellee Harrell's Affidavit in Support of Motion for Preliminary Injunction, which is part of the original record in this Court. Mrs. Harrell stated:

> My family has always been close, and I knew that my brother, Mr. George Lassiter, and my sister, Mrs. Erma Nowell, who both live in Washington, D.C., would help me care for my children. I also thought I might be able to make a better life for myself and my children in Washington. That is why I came to Washington, D.C., in September of 1966. I have stayed here ever since that date and have no desire to return to New York. I regard Washington, D.C., as my home, because my children and I need to be together with my family very much. *Id.* at 1-2.

that her family did not meet the durational residence requirement (A. 8).

2. *Vera M. Barley*

Appellee Barley first resided in the District of Columbia in 1935 (A. 21). After an absence of several years she returned to Washington in March 1941, at which time she was suffering from mental illness (A. 21). A month later, she was committed by court order to Saint Elizabeth's Hospital where she remained continuously until the decision by the court below (A. 21).

Since 1965, Mrs. Barley has been deemed competent[9] and has desired to live in the District of Columbia in a foster care home, a plan advised by her doctors (A. 21).[9] Therefore, in January 1967, officials at Saint Elizabeth's Hospital referred Mrs. Barley to the Department of Public Welfare for the purpose of establishing her eligibility for public assistance (A. 22). The goal of the hospital was to obtain financial support for her from the Department of Public Welfare so that she could be placed in a foster care home (A. 22).[10] The application was denied in February 1967,

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[9] See D.C. Code, §21-564(b).

[9] In an Affidavit in Support of Motion for Preliminary Injunction, which is a part of the original record in this Court, Mrs. Barley stated:

> I have lived here for the last 26 years. I wish to remain here. I do not regard any other state as my home. I have no property elsewhere, and my relatives in California are unable to take care of me. For the last few years I have never thought I would like to live elsewhere. *Id.* at 2.

[10] Because of Mrs. Barley's age (A. 21), employment was not a realistic goal. See Letter to Mr. Joseph Dougan from Mrs. Alice Cohen, dated June 30, 1967, which is attached to the complaint in the *Barley* case as Exhibit E and is part of the original record in this Court.

because of her failure to establish residence in Washington for one year immediately prior to her hospitalization in April 1941 (A. 22). An administrative appeal sustained the denial of her application on the ground that she failed to meet the one-year durational residence requirement (A. 22).[11]

3. *Gloria Jean Brown*

Before moving to the District of Columbia in February 1966, appellee Brown lived in a public housing project with her mother and two of her three children in Fort Smith, Arkansas (A. 35). When her mother moved to Oklahoma to obtain employment, she was informed that she was ineligible for public housing because she was a minor (A. 35). Having no place to live, she decided to move to Washington where she had resided as a young girl and where her oldest child had been living since 1962 with her father (A. 35).[12]

[11] In addition to the durational residence statute, appellee Barley challenged the constitutionality of District of Columbia Department of Public Welfare Handbook of Public Assistance Policies and Procedures, HPA II, Section EL 9.1, III, B, 3, which provided that time spent in an institution as a public charge during the first year a person lives in the District of Columbia does not count toward meeting the District's one-year durational residence requirement. In its opinion and decree, the court below ruled this regulation invalid (A. 70, 88).

[12] In an Affidavit in Support of Motion for Preliminary Injunction, which is part of the original record in this Court, appellee Brown stated:

> I came to Washington not only because my home in Arkansas had been broken and my son was living here, but also because I consider Washington my home. My parents moved to Washington when I was an infant. I attended Cleveland School through the third grade, from 1950 to 1954. From 1955 to 1957 I attended Bundy, Monroe and Lovejoy Schools in Washington. I lived in Fort Smith with my mother during the 1954-55 school year and from 1957 until 1962. In 1962, I returned

Appellee Brown arrived in Washington in February 1966, having left her two daughters in the temporary care of her grandmother in Fort Smith (A. 35). In August 1966, the daughters rejoined their mother in Washington (A. 35). In November of that year, shortly before the birth of her fourth child, she applied for public assistance but was told that she and her children were ineligible because they had not lived in Washington for one year (A. 35).[13] She reapplied for assistance for herself and her oldest child and was accepted for AFDC in February 1967 (A. 35-36). She was told, however, that her two older daughters would not be eligible for assistance until August 1967, and that her newborn child would not be eligible until his first birthday in November 1967 (A. 36).[14] In June 1967, she submitted a formal application for public assistance on behalf of her three youngest children and was informed that they were ineligible for failure to satisfy the durational residence requirement (A. 36).

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to my father's family and began tenth grade at Roosevelt, in Washington. In addition to my father and son, I have four sisters, two brothers, six aunts, seven uncles, and a grandmother in Washington. *Id.* at 2.

[13] According to her Affidavit in Support of Motion for Preliminary Injunction, a Welfare Department official "suggested placing the children in Junior Village, but I told him I did not want to do that because I did not want to become separated from my family." *Id.* at 3. Junior Village is the District's institution for dependent and neglected children.

[14] Pursuant to D.C. Code, §3-203(b), a child born in the District of Columbia must satisfy the one-year durational residence requirement unless, at the time of his birth, his mother has lived in the District for at least one year. Thus, in the case of Mrs. Brown's youngest child, he would not be eligible for public assistance until his first birthday since his mother, at the time of his birth, had resided in Washington for only nine months.

4. Clay Mae Legrant

Appellee Legrant moved to the District of Columbia from South Carolina with her two children in March 1967, after the death of her mother (A. 45). She planned to live with her sister and expected that her brother, upon his discharge from the armed forces, would be returning to Washington where he lived before entering the Army (A. 45).[15] Being pregnant and in ill health, she was unable to obtain regular employment; consequently, she applied for public assistance in July 1967 (A. 45). She received a notice of ineligibility on the ground that she and her children did not satisfy the one-year durational residence law (A. 45).

Summary of Argument

I. This Court has ruled that legislative classifications in a statute must be reasonable in light of the statute's purposes. Furthermore, the statutory purpose itself must be a lawful one. Where these criteria are not satisfied, the statute conflicts with the Constitution's guarantee of equal protection of the laws.

Although the District of Columbia's public assistance durational residence law was enacted by the Congress, this fact should not preclude the Court from applying this equal protection test when judging its constitutionality. Al-

[15] Appellee Legrant had previously lived in Washington with her sister from November 1965, to August 1966, when she returned to South Carolina to care for her mother who had had a stroke. When her mother died in March 1967, her father moved in with her older brother and his eight children but there was insufficient space in the four-room house for her and her family. See appellee Legrant's Affidavit in Support of Motion for Preliminary Injunction, which is part of the original record in this Court, at 2.

though the Fifth Amendment, unlike the Fourteenth, contains no equal protection clause as such, the guarantee against depriving persons of life, liberty or property without due process of law includes the equal protection concepts separately stated in the Fourteenth Amendment. The Court has recognized that both equal protection and due process have a common core. The legislative history of Congressional debates shortly before and at the time of the adoption of the Fourteenth Amendment, as well as early state court decisions, reveal that the concept of equal protection of the laws has always been considered to be encompassed by the due process clause of the Fifth Amendment.

This construction of the due process clause is particularly sound when judging the constitutionality of a statute enacted by Congress in its capacity as the legislature for the District of Columbia. If the Court were to render unconstitutional, under the equal protection clause of the Fourteenth Amendment, a state law, it would be unthinkable that a similar law attacked under the Fifth Amendment would be sustained simply because it was enacted by Congress as the District of Columbia's legislature.

In judging whether a statute should be declared unconstitutional, the Court has developed two distinct sets of standards. When the law in question takes the form of an economic regulation, the Court has held that it may not be found invalid if any state of facts reasonably can be conceived that would justify it. But when the effect of a law is to impinge upon important individual liberties protected by the first eight Amendments and the Fourteenth, the Court insists that much closer scrutiny be given to the statute in question in order to insure that it bears a rea-

sonable relationship to the achievement of the governmental purpose asserted as its justification. The need for such close scrutiny is heightened where the persons subject to the legislation are composed essentially of minority groups who, because of factors such as race or poverty, do not have the normal opportunity to make their grievances known through the ordinary political processes.

The District's public assistance durational residence law affects fundamental freedoms of a group of persons characterized by its extreme poverty and its inaccessibility to the normal political processes. Denying public assistance to the appellees and the class which they represent is a threat to their very existence and may result in break-up of family units, sickness, malnutrition or death. Furthermore, the effect of denying a person public assistance solely because he has recently moved to the District of Columbia is to penalize his exercise of the constitutional rights of movement and association.

A law which has the effect of impinging on so many personal rights is the very type which, under the decisions of this Court, must be subjected to the strictest scrutiny when determining whether the classification in question should be upheld. Particularly should this be so in the instant case where the statutory classification involved has recently been examined by a number of federal courts which, with one exception, have ruled it unconstitutional.

Appellants defend the durational residence law on the ground that it is reasonably related to the accomplishment of several purposes. First, appellants argue that the law is required to prevent migration to the District of Columbia of paupers seeking higher welfare payments. Although

this purpose seems to accord with the historical reasons for such durational residence laws, it is both a legally impermissible justification and a factually unfounded one. This Court has ruled that barring paupers from a jurisdiction is not a lawful state purpose, whether or not an influx of such persons creates administrative or financial difficulties. In any event, the supposed facts which underlie this asserted purpose—that persons move from state to state in order to obtain higher welfare payments—have merely been asserted by appellants. All available evidence points to precisely the opposite conclusion and reveals that people move for reasons connected with job opportunity, association with family, and the like. Hence, this supposed purpose for the law is both legally impermissible and factually untrue.

Appellants further assert that the law serves the purpose of providing an objective test of residence for persons applying for public assistance. Although this purpose is not *per se* an unlawful one, it must be accomplished by means which do not unnecessarily inhibit or penalize the exercise of constitutional rights. The law in question, however, does not meet this test since it sweeps before it all persons who have lived in the state for less than one year without regard to the true nature of their residence. The facts of this case illustrate the overbreadth of the law as an objective test of residence since the undisputed evidence is that appellees severed all ties with other jurisdictions before moving to the District of Columbia and they intend to remain here permanently.

Finally, appellants suggest that no purpose at all need be offered to justify the classification in question since the statute confers a mere noncontractual benefit which does

not have to be given in the first place. But the Court has consistently rejected the notion that infringement of constitutional rights may be justified on such grounds. The fact that a government may decline to extend to its citizens the enjoyment of a particular set of benefits does not mean that it may attach unconstitutional conditions to the benefits that are given.

In summary, all of the purposes which, according to appellants, underlie and justify the one-year durational residence law are either unlawful *per se*, ones which must be accomplished by narrower means, or are factually untrue. Hence, none of them may be invoked to save the classification on the ground that it is reasonably related to the accomplishment of these purposes. Since no purpose remains to justify the statute, it must fall as an arbitrary classification proscribed by the due process clause of the Fifth Amendment.

II. Appellants contend that an affirmance of the decision below will undermine the validity of durational residence requirements in other areas of the law. No such result follows, however, because public assistance durational residence statutes are fundamentally different from such requirements in other areas.

States commonly have durational residence requirements in four major areas not relating to public assistance—voting, public office, divorce and licensing. Requirements in these first two areas are frequently justified on the ground that the state has a valid interest in making certain that voters and elected officials are familiar with the issues. Durational residence requirements in divorce laws are upheld on the grounds that they insure that defendants receive adequate

notice and that they protect society against hastily brought suits, thereby helping to preserve family stability. Such requirements in the licensing area, although frequently struck down, may be justified because of the strong interest of the state in upholding standards of professional persons and others who offer their services to the general public.

The reasons discussed by the courts in justifying durational residence tests in other areas demonstrate the uniqueness of such provisions in public assistance laws. As already discussed, the statute in question is justified only by reference to objectives which are unlawful or factually unsupportable. Furthermore, durational tests in welfare have far more disastrous consequences to those whom they affect than do such provisions in other areas. In addition, durational residence tests in welfare flaunt the primary purpose of the overall statutory program of which they are a part, namely giving assistance to the needy. Durational tests in other areas, however, are usually consistent with and help promote the result sought by related statutory provisions. Finally, public assistance durational residence tests are unique with respect to the extent of the federal government's involvement in programs of which they are a part. Under such circumstances, a state's interest in protecting its durational residence statute is much less.

Because of the special features of durational residence laws in welfare, particularly concerning their purposes and the severity of their impact, decisions concerning their validity will have little, if any, relevance in determining the validity of other types of durational residence laws.

ARGUMENT

I.

The Provisions of D.C. Code, §3-203 Which Preclude the Awarding of Public Assistance to Persons Who Have Not Resided in the District of Columbia for One Year Immediately Preceding the Date of Filing an Application for Assistance Violate the Equal Protection of the Laws Guaranteed by the Due Process Clause of the Fifth Amendment.

A. The Requirements of Equal Protection

It is axiomatic that a law "which affects the activities of some groups differently from the way in which it affects the activities of other groups" is not necessarily proscribed by the requirements of equal protection. *Kotch* v. *Board of River Port Pilot Comm'rs*, 330 U.S. 552, 556 (1947). The Court long ago set forth the test for judging equal protection violations in legislative classifications when it stated that classification

> must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis. *Gulf, Colorado & Santa Fe Ry.* v. *Ellis*, 165 U.S. 150, 155 (1897).

This test, which the Court has reiterated on countless occasions,[16] was more simply put in *McLaughlin* v. *Florida*, 379 U.S. 184, 191 (1964):

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[16] *See, e.g., Southern Ry.* v. *Greene*, 216 U.S. 400, 417 (1910); *Atchison & Santa Fe Ry.* v. *Vosburg*, 238 U.S. 56, 59 (1915); *Royster Guano Co.* v. *Virginia*, 253 U.S. 412, 415 (1920); *Truax*

> The courts must . . . determine the question whether the classifications drawn in a statute are reasonable in light of its purpose. . . .

See also *Carrington* v. *Rash*, 380 U.S. 89, 93 (1965).[17] The Court has further pointed out that one basis for judging the reasonableness of the classification is whether it "implies action consistent with the legitimate interests of the State. . . ." *Truax* v. *Raich*, 239 U.S. 33, 42 (1915). A statutory classification not reasonably related to a proper governmental objective will not survive the constitutional test. *Bolling* v. *Sharpe*, 347 U.S. 497 (1954).[18]

The fact that the statute here in question is an Act of Congress rather than a state law should not preclude the application to this case of the equal protection test just outlined. It is literally true, of course, that the Fifth Amendment, "unlike the Fourteenth, has no equal protec-

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v. *Corrigan*, 257 U.S. 312, 337 (1921); *Air Way Corp.* v. *Day*, 266 U.S. 71, 85 (1924); *Power Mfg. Co.* v. *Saunders*, 274 U.S. 490, 493 (1927); *Louisville Gas Co.* v. *Coleman*, 277 U.S. 32, 37 (1928); *Ohio Oil Co.* v. *Conway*, 281 U.S. 146, 160 (1930); *Metropolitan Co.* v. *Brownell*, 294 U.S. 580, 583 (1935); *Hartford Co.* v. *Harrison*, 301 U.S. 459, 462 (1937); *Asbury Hosp.* v. *Cass County*, 326 U.S. 207, 214 (1945); *Morey* v. *Doud*, 354 U.S. 457, 465 (1957); *McLaughlin* v. *Florida*, 379 U.S. 184, 190 (1964); *Baxstrom* v. *Herold*, 383 U.S. 107, 111 (1966); *Rinaldi* v. *Yeager*, 384 U.S. 305, 309 (1966).

[17] The more restrictive view of equal protection, expressed in such opinions of the Court as *Pace* v. *Alabama*, 106 U.S. 583, 585 (1882) and *Powell* v. *Pennsylvania*, 127 U.S. 678, 687 (1888), that the constitutional provision is not offended so long as the statute treats equally all to whom it is applicable, was soon discarded. See *McLaughlin* v. *Florida*, *supra*, at 190.

[18] *See also* Note, *Discriminations against the Poor and the Fourteenth Amendment*, 81 *Harv. L. Rev.* 435, 437 (1968).

tion clause," *Currin* v. *Wallace*, 306 U.S. 1, 14 (1939).[19] But the Court, while acknowledging this fact in *Bolling* v. *Sharpe*, *supra*, emphasized that both equal protection and due process stem from "our American ideal of fairness." 347 U.S. at 499.[20] It concluded that, in view of its decision prohibiting states from maintaining racially segregated public schools,[21] "it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government." 347 U.S. at 500. *Cf. Hurd* v. *Hodge*, 334 U.S. 24 (1948).[22] Furthermore, in other cases, the Court

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[19] The Court has made similar statements in *LaBelle Iron Works* v. *United States*, 256 U.S. 377, 392 (1921); *Steward Mach. Co.* v. *Davis*, 301 U.S. 548, 584 (1937); *United States* v. *Carolene Prods. Co.*, 304 U.S. 144, 151 (1938); *Sunshine Coal Co.* v. *Adkins*, 310 U.S. 381, 401 (1940); *Helvering* v. *Lerner Stores Corp.*, 314 U.S. 463, 468 (1941); *Detroit Bank* v. *United States*, 317 U.S. 329, 337 (1942). *Cf. Brushaber* v. *Union Pac. R.R. Co.*, 240 U.S. 1, 24 (1916). But none of those decisions suggested that the statutory provision which the Court upheld against an attack under the Fifth Amendment would have fallen if the equal protection clause of the Fourteenth Amendment had been applicable. In each of the cases, the Fifth Amendment equal protection claim was raised in the context of alleged discriminatory taxation or regulation of business—areas in which the states, too, have traditionally been given "the utmost latitude under the Equal Protection Clause . . . in defining categories of classification." *Allied Stores* v. *Bowers*, 358 U.S. 522, 532 (1959) (Brennan, J., concurring); *see also Nashville, C. & S. L. Ry.* v. *Browning*, 310 U.S. 362, 370 (1940); *Tigner* v. *Texas*, 310 U.S. 141, 149 (1940). Thus, it is likely that if the statutes in question had been those of a state rather than the federal government, the Fourteenth Amendment equal protection argument would have been rejected as well. *See, e.g., Steward Mach. Co.* v. *Davis*, *supra*, at 584; *United States* v. *Carolene Prods. Co.*, *supra*, at 151. These cases, then, would not support the argument that equal protection claims against acts of Congress are governed by wholly different standards than similar claims against acts of states. *See also District of Columbia* v. *Brooke*, 214 U.S. 138, 150 (1909).

[20] *See Griswold* v. *Connecticut*, 381 U.S. 479, 517 (1965) (Black, J., dissenting).

[21] *See Brown* v. *Bd. of Educ.*, 347 U.S. 483 (1954).

[22] In *Hurd*, the Court had before it the constitutionality of judicial enforcement of racially restrictive covenants in the District

has applied equal protection standards in judging the constitutionality of classifications in federal laws. *United States* v. *Petrillo*, 332 U.S. 1, 8 (1947); *Schneider* v. *Rusk*, 377 U.S. 163, 168 (1964).[22]

The Congressional debates shortly before and at the time of adoption of the Fourteenth Amendment indicate that the concept of equal protection of the laws was considered to be already an integral part of the due process clause of the Fifth Amendment at the time the Fourteenth Amendment was being considered. Several years before the debates on the Amendment, Representative Bingham, "the Madison of the first section of the Fourteenth Amendment", *Adamson* v. *California*, 332 U.S. 46, 74 (1947) (Black, J., dissenting), in discussing the matter of slavery in the new states of the Union said:

> It must be apparent that the absolute equality of all, and the equal protection of each, are principles of our Constitution, which ought to be observed and enforced in the organization and admission of new States. The Constitution provides, as we have seen,

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of Columbia, an action which the Court had previously ruled would be violative of equal protection if taken by state courts. *See Shelley* v. *Kraemer*, 334 U.S. 1 (1948). The Court concluded:

> It is not consistent with the public policy in the United States to permit federal courts in the Nation's capital to exercise general equitable powers to compel action denied the state courts where such state action has been held to be violative of the guaranty of the equal protection of the laws. 334 U.S. at 35.

[22] The Court applied equal protection standards in these two cases, although, unlike *Bolling* v. *Sharpe*, *supra*, they did not involve distinctions based on race. *See also Pennsylvania R.R. Co.* v. *Day*, 360 U.S. 548, 554 (1959) (Black, J., dissenting); Harvith, *Federal Equal Protection and Welfare Assistance*, 31 *Albany L. Rev.* 210, 220-21 (1967).

> that *no person* shall be deprived of life, liberty, or property, without due process of law. It makes no distinction either on account of complexion or birth—it secures these rights to all persons within its exclusive jurisdiction. This is equality. *Cong. Globe,* 34th Cong., 3d Sess., App. 140 (1857).[24]

In the debates on the Amendment itself, Congressman Bingham's view is stated by others. Thus Representative John J. Farnsworth of Illinois, while discussing the equal protection provision, said:

> "Equal protection of the laws;" can there be any well-founded objection to this? Is not this the very foundation of a republican government? Is it not the undeniable right of every subject of the Government to receive "equal protection of the laws" with every other subject? How can he have and enjoy equal rights of "life, liberty, and the pursuit of happiness" without "equal protection of the laws?" This is so self-evident and just that no man whose soul is not too cramped and dwarfed to hold the smallest germ of justice can fail to see and appreciate it. *Cong. Globe,* 39th Cong., 1st Sess., 2539 (1866).[25]

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[24] In a number of opinions rendered before the adoption of the Fourteenth Amendment, state courts interpreted "due process of law" and "law of the land" provisions in the state constitutions (both of these terms convey the same meaning—*see Murray's Lessee* v. *Hoboken Land and Improvement Co.,* 59 U.S. (18 How.) 272 (1856)) to include the guarantee of equal protection of the laws. *See e.g., Vanzant* v. *Waddell,* 2 Yerg. 260 (Tenn. 1826); *State Bank* v. *Cooper,* 2 Yerg. 599 (Tenn. 1831); *Reed* v. *Wright,* 2 Greene 15 (Iowa 1849); *Sears* v. *Cottrell,* 5 Mich. 251 (1858); *Holden* v. *James,* 11 Mass. 396 (1814).

[25] *See also* the statements by Senator Poland of Vermont, *Cong. Globe,* 39th Cong., 1st Sess., p. 2961 (1866); Representative Higby

In light of these cases and legislative history, the court below correctly ruled that "[d]enial of equal protection offends the Due Process Clause of the Fifth Amendment, applicable to this jurisdiction, as well as the Equal Protection Clause of the Fourteenth, applicable in terms to the States" (A. 61). This construction of the Fifth Amendment is especially sound in cases, such as the instant one, where a challenge is made to a statute enacted by Congress in its capacity as the District of Columbia's local legislature. As the Court of Appeals for the District of Columbia Circuit noted in *Hamilton National Bank of Washington* v. *District of Columbia*, 176 F.2d 624, 630 (C.A.D.C. 1949):

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of California, *Cong. Globe*, 39th Cong., 1st Sess., 1054 (1866); Representative Stevens of Pennsylvania, *Cong. Globe*, 39th Cong., 1st Sess., 2459 (1866); Representative Bingham, *Cong. Globe*, 39th Cong., 1st Sess., 1094 (1866).

The fact that the drafters of the Fourteenth Amendment referred separately in the same section to depriving persons of life, liberty or property without due process and denying them equal protection, does not demonstrate that the two clauses must have different meanings. A similar argument, adopted by the Court in *Hurtado* v. *California*, 110 U.S. 516, 534-35 (1884), contended that, since the Fifth Amendment contains both a due process provision and a requirement for grand jury procedure, canons of construction require that the former provision be read not to include the latter so that no part of the amendment be superfluous. Hence the Court concluded that since the grand jury provision was not part of Fifth Amendment due process, it could not be a part of Fourteenth Amendment due process and, therefore, had no application to state criminal proceedings. This construction argument has since been discredited. *See Powell* v. *Alabama*, 287 U.S. 45, 65-67 (1932); *Gideon* v. *Wainwright*, 372 U.S. 335, 341 (1963); *Chicago, Burlington & Quincy R.R. Co.* v. *Chicago*, 166 U.S. 226, 241 (1897); *Malloy* v. *Hogan*, 378 U.S. 1, 6 (1964). The latter two cases hold that the just compensation and the self-incrimination provisions of the Fifth Amendment apply to the states through the due process clause of the Fourteenth. *See also Cichos* v. *Indiana*, 385 U.S. 76 (1966). *And see* Mott, *Due Process of Law* (Bobbs-Merrill Co. 1926) 276.

> [I]t is true, and ought to be true, that "The Fifth Amendment as applied to the District of Columbia implies equal protection of the laws." *Sims* v. *Rives*, 1936, 66 App. D.C. 24, 84 F.2d 871, 878; *Lappin* v. *District of Columbia*, 1903, 22 App. D.C. 68. We say this is true because this court so held in the two cases just cited. We say it ought to be true because the due process of the Fifth Amendment should include or imply for the inhabitants of the District of Columbia equal protection of the laws enacted by Congress as the local legislature of the District. It is unthinkable that Congress, enacting statutes applicable only in this jurisdiction, does not violate the due process clause of the Fifth Amendment if it denies the people of this District equal protection of the laws, just as a state legislature violates the "equal protection" clause of the Fourteenth Amendment if it does the same thing.[26]

The law here in question imposes a durational residence test on welfare recipients in the District of Columbia in the same fashion that such test is imposed by most of the states. If the Court were to render unconstitutional such statutes when passed by state legislatures,[27] it surely "would

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[26] In a case decided only two months ago, *Bolton* v. *Harris*, —— F.2d —— (C.A.D.C. 1968), appellant challenged the mandatory commitment provisions of D.C. Code, §24-301(d) and the release provisions of D.C. Code, §24-301(e) on the ground that they violated equal protection by not affording safeguards available for persons civilly committed. Although construing the provisions to include these safeguards to save them against constitutional attack, Chief Judge Bazelon, speaking for a unanimous court, initially noted: "The equal protection guarantee applies to the federal government through the Fifth Amendment." —— F.2d —— n. 3. *Accord Dixon* v. *District of Columbia*, —— F.2d —— n. 3 (C.A. D.C. 1968).

[27] The constitutionality of state durational residence laws in public assistance programs is squarely before the Court in the two cases

be unthinkable that the same Constitution would impose a lesser duty on the federal government." *Bolling* v. *Sharpe*, *supra*, at 500.[28]

B. The Applicable Standards for Judging Equal Protection Violations.

Before applying the test of equal protection to the facts of this case, it is imperative to establish the relevant standards for judging constitutional violations. The Court has, from the beginning, emphasized the need for great restraint in declaring statutes unconstitutional. See *Fletcher* v. *Peck*, 10 U.S. (6 Cranch) 48, 72 (1810). Thus, the Court has emphasized that the burden of attacking a legislative act lies wholly "on him who denies its constitutionality." *Brown* v. *Maryland*, 25 U.S. (12 Wheat.) 266, 277 (1827). In its early decisions construing statutes challenged under

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to be argued with the instant one. See *Shapiro* v. *Thompson*, No. 813, Oct. Term, 1967, and *Reynolds* v. *Smith*, No. 1138, Oct. Term, 1967.

[28] Although it might be argued that it is not illogical that Congress, acting as the national legislature in our federal system, should not be limited in its courses of action in the same respects that the Constitution limits the states which play their particular and different roles, such an analysis should not be applied where the federal government exercises responsibilities as a state government. Assuming that there are sufficient differences between the concept of due process and the concept of equal protection to permit durational residence laws to be upheld under the former and invalidated under the latter, such a result would so "shock the conscience", *Rochin* v. *California*, 342 U.S. 165, 172 (1952), as to require invalidation under due process. The obvious unfairness of a constitutional rule which would make it illegal for a local government in Virginia to impose a durational residence test but make it legal for another local government across the river in the District of Columbia to impose such a test calls for the Court, as it did in *Bolling* v. *Sharpe*, *supra*, to find in the concepts of due process and equal protection enough common ground to avoid such a result.

equal protection and due process principles of the Fourteenth Amendment, the Court repeated this rule. See, e.g., *Munn* v. *Illinois*, 94 U.S. 113, 132 (1876). In *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61 (1911), the Court sought to distill the relevant rules by which equal protection arguments must be tested, noting, *inter alia*, that the person attacking the statutory classification "must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary" and that "if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed." 220 U.S. at 78-79.[29]

The Court has recognized, however, that not all constitutional challenges should be reviewed in precisely the same way. Thus, in *Board of Education* v. *Barnette*, 319 U.S. 624 (1943), involving the constitutionality of the public school flag salute requirement, the Court noted:

> The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions

[29] The latter of these two rules, which has been stated on innumerable occasions since, *see, e.g.*, *Rast* v. *Van Deman & Lewis Co.*, 240 U.S. 342, 357 (1916); *Crescent Cotton Oil Co.* v. *Mississippi*, 257 U.S. 129, 137 (1921); *Heisler* v. *Thomas Colliery Co.*, 260 U.S. 245, 255 (1922); *State Bd. of Tax Comm.* v. *Jackson*, 283 U.S. 527, 537 (1931); *Metropolitan Co.* v. *Brownell*, 294 U.S. 580, 584 (1935); *Carmichael* v. *Southern Coal & Coke Co.*, 301 U.S. 495, 509 (1937); *United States* v. *Carolene Prods. Co.*, *supra*, at 154; *Asbury Hosp.* v. *Cass County*, *supra*, at 215; *Morey* v. *Doud*, *supra*, at 464; *Allied Stores* v. *Bowers*, 358 U.S. 522, 528 (1959); *McGowan* v. *Maryland*, 366 U.S. 420, 426 (1961), appears to have been first stated in *Munn* v. *Illinois*, *supra*, at 132. In *Munn* an equal protection challenge was made to an Illinois statute seeking to regulate public warehouses and the storage and inspection of grain. In the cases just cited which repeat the *Munn* language, all involve the matter of taxation or economic regulation.

> which the legislature may have a "rational basis" for adopting. But freedoms of speech and of press, of assembly and of worship may not be infringed on such slender grounds. 319 U.S. at 639.

Central to that case was a First Amendment right which, as Mr. Justice Frankfurter, concurring in *Kovacs* v. *Cooper*, 336 U.S. 77, 95 (1949), stated "come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements." Those cases, and many before and since, recognize that the freedoms of the First Amendment are of such importance that

> [w]hen it is shown that state action threatens significantly to impinge upon constitutionally protected freedom it becomes the duty of this Court to determine whether the action bears a reasonable relationship to the achievement of the governmental purpose asserted as its justification. *Bates* v. *Little Rock*, 361 U.S. 516, 525 (1960).

See also *NAACP* v. *Alabama*, 357 U.S. 449 (1958); *see generally* McKay, *The Preference for Freedom*, 34 *N.Y.U.L. Rev.* 1182 (1959).

It is not only in the First Amendment area that the Court gives especially close scrutiny to claims of violations of constitutional rights. Thus, in *United States* v. *Carolene Prods. Co., supra*, the Court noted that

> [t]here may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amend-

ments, which are deemed equally specific when held to be embraced within the Fourteenth. 304 U.S. at 152 n. 4.

Furthermore, the Court has taken the same approach in examining certain kinds of challenges based on equal protection.[30] Thus, in cases involving statutes imposing classifications based on race, the Court has refused to uphold them if their only justification is that they might "serve a rational purpose." *Loving* v. *Virginia,* 388 U.S. 1, 8 (1967). See also *McLaughlin* v. *Florida, supra.*

But the Court has not confined this approach merely to classifications based on race. In *Skinner* v. *Oklahoma,* 316 U.S. 535 (1942), involving a law requiring the sterilization of "habitual criminals," but specifically exempting certain offenders such as embezzlers, the Court noted that because a basic liberty was involved, "strict scrutiny of the classification which a State makes in a sterilization law is essential . . . " to insure that no person is denied equal protection of the laws. 316 U.S. at 541. More recently, in *Harper* v. *Board of Elections,* 383 U.S. 663 (1966), the Court ruled unconstitutional Virginia's poll tax. Noting that "lines drawn on the basis of wealth or property . . . are traditionally disfavored," the Court stated:

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[30] It has only been in comparatively recent times that the equal protection clause has been used with frequency to vindicate individual civil rights. Its traditional use has concerned the imposition of limitations on the power of states to regulate economic matters. Thus, it is not surprising that, in the equal protection area, opinions of the Court emphasizing that special scrutiny will be given to statutory classifications impinging on important individual freedoms are of a relatively recent vintage. *See* Harris, *The Quest for Equality* (La. State Univ. 1960), in which the author studied 554 decisions of the Court in which the equal protection clause was invoked. He points out that 76.9% of them dealt with legislation affecting economic interests. *See id.* at 59.

> We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined. 383 U.S. at 668, 670.[21]

In summary, numerous decisions of the Court involving rights asserted both under the First Amendment and under the equal protection clause make it clear that when legislative classifications impinge upon important liberties, the Court will take an especially close look at the rights involved and require the state to do more than show that some state of facts might reasonably be conceived to justify the discrimination. In examining the nature of the discrimination in the instant case, it is important to keep in mind the individual rights involved and the effect the classification has on them.

The Court's insistence on careful scrutiny of statutes which impinge upon fundamental rights has been accompanied by a second approach to constitutional adjudication which, although more recent in development, is of great relevance to this case. In *Harper* v. *Board of Elections, supra,* the Court made special mention of the fact that "[l]ines drawn on the basis of wealth or property, like

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[21] *See also Griswold* v. *Connecticut*, 381 U.S. 479 (1965). There the Court struck down a Connecticut law prohibiting the use of any devices to prevent conception. Mr. Justice Goldberg, in a concurring opinion joined by the Chief Justice and Mr. Justice Brennan, noted:

> In a long series of cases this Court has held that where fundamental personal liberties are involved, they may not be abridged by the states simply on a showing that a regulatory statute has some rational relationship to the effectuation of a proper state purpose. 381 U.S. at 497

And see 381 U.S. at 503 (White, J., concurring).

those of race . . . are traditionally disfavored." 383 U.S. at 668. The statute in *Harper*, by requiring the payment of a fee to vote, very directly placed a special burden on the poor. But whether or not the burden is placed directly or indirectly, the Court has examined with great care statutes and practices which tend to affect the poor more harshly than the rich.

Thus, in *Griffin* v. *Illinois*, 351 U.S. 12 (1956), the Court upheld petitioner's contention that the failure of the state to provide him, at no cost, a transcript of his criminal trial so that he might take an appeal, violated the provisions of the Fourteenth Amendment. This conclusion was reached despite the fact that no Illinois law placed any more restriction on petitioner in bringing his appeal than on any other potential appellant. Petitioner's difficulty lay in the fact that he was poor. Hence, a law which made no provision for giving him a free transcript burdened him in a very special way.[32] In a somewhat different setting, Mr. Justice White, concurring in *Griswold* v. *Connecticut, supra*, recently noted:

> The anti-use statute, together with the general aiding and abetting statute, prohibits doctors from affording advice to married persons on proper and effective methods of birth control. . . . And the clear effect of

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[32] The *Griffin* approach has been applied in a number of other criminal cases. *See e.g., Rinaldi* v. *Yeager*, 384 U.S. 305 (1966); *Douglas* v. *California*, 372 U.S. 353 (1963); *Lane* v. *Brown*, 372 U.S. 477 (1963); *Draper* v. *Washington*, 372 U.S. 487 (1963); *Smith* v. *Bennett*, 365 U.S. 708 (1961); *McCrary* v. *Indiana*, 364 U.S. 277 (1960); *Douglas* v. *Greene*, 363 U.S. 192 (1960); *Burns* v. *Ohio*, 360 U.S. 252 (1959); *Ross* v. *Schneckloth*, 357 U.S. 575 (1958); *Eskridge* v. *Board of Prison Terms & Paroles*, 357 U.S. 214 (1958).

> these statutes, as enforced, is to deny disadvantaged citizens of Connecticut, those without either adequate knowledge or resources to obtain private counseling, access to medical assistance and up-to-date information in respect to proper methods of birth control . . . . [A] statute with these effects bears a substantial burden of justification when attacked under the Fourteenth Amendment. 381 U.S. at 503.[23]

The underlying approach of these cases was well stated in the recent decision involving segregation of the races in the District of Columbia school system. After noting that careful scrutiny is used to examine practices which particularly affect disadvantaged minorities, the court stated:

> The explanation for this additional scrutiny of practices which, although not directly discriminatory, nevertheless fall harshly on such groups relates to the judicial attitude toward legislative and administrative judgments. Judicial deference to these judgments is predicated in the confidence courts have that they are just resolutions of conflicting interests. This confidence is often misplaced when the vital interests of the poor and of racial minorities are involved. For these groups are not always assured of a full and fair hearing through the ordinary political processes, . . . because of the abiding danger that the power structure . . . may incline to pay little heed to even the deserving interests of a politically voiceless and invisible minority. These considerations impel a closer judicial sur-

[23] *See also Williams* v. *Shaffer*, 385 U.S. 1037 (1967) (Douglas, J., with whom the Chief Justice concurred, dissenting from the denial of certiorari).

veillance and review of administrative judgments adversely affecting racial minorities and the poor, than would otherwise be necessary. *Hobson* v. *Hansen*, 269 F.Supp. 401, 507-08 (D.D.C. 1967).[34]

As appellees demonstrate in Section I.C., *infra*, the durational residence law has the effect of placing even greater burdens on the already desperate economic plight of the persons who are affected by the law. In such circumstances, the Court should subject to closer scrutiny a law which "impinges on critical personal interests . . . ." *Snell* v. *Wyman*, —— F.Supp. —— (S.D.N.Y. 1968) (Kaufman, J., dissenting).[35]

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[34] The reference of the court in *Hobson* to the need for special scrutiny of practices which may not be examined through the ordinary political processes recalls the suggestion of this Court in *United States* v. *Carolene Prods. Co.*, *supra*, at 152, n. 4, that legislation which restricts the political process, thereby blocking the very method needed to repeal undesirable legislation, may be subject to more exacting judicial scrutiny than other kinds of legislation. The Court there had in mind restrictions on the right to vote, dissemination of information, interferences with political organizations and the like. But for persons in desperate economic straits, their power to repeal legislation which accentuates their difficulties may, as a practical matter, be as nonexistent as that of the group which finds that the political processes have been more formally restricted. In either case, the Court, recognizing the difficulty of bringing change through the normal operation of the legislative system, should subject the legislation in question to more exacting judicial scrutiny. *See also State Highway Dep't* v. *Barnwell Bros.*, 303 U.S. 177, 185, n. 2 (1938).

[35] In that case, the court had before it the constitutionality of New York laws and regulations which require welfare recipients to repay the costs of assistance benefits out of specified kinds of assets. Although the majority upheld the provision, it explicitly distinguished the recent cases involving public assistance durational residence requirements. Without implying any criticism of the result reached by the majority in that case, appellees suggest that the standard for judging equal protection violations which Circuit

C. The Nature of the Equal Protection Violation

D.C. Code, §3-203(a) establishes two classes of persons: those who have resided in the District of Columbia for at least one year and those who have resided here for less than one year.[36] The former group is eligible to be considered for public assistance and the latter group is not. To determine whether the court below applied correct standards in ruling that the classification was not reasonably related to a proper governmental objective,[37] it is necessary to examine whether the durational residence law impinges on fundamental personal freedoms of a disadvantaged and voiceless minority. As appellees will demonstrate, the statute has this very effect and hence the district court's approach, as well as its conclusions, was sound.

Judge Kaufman invoked in his dissent is the appropriate one to apply here.

[36] It is important to bear in mind that the statute is a *durational* residence requirement, not a requirement that a person be a resident.

[37] As noted earlier, see fn. 11, *supra*, the court below also ruled unconstitutional a Department of Public Welfare regulation which provided that time spent in an institution as a public charge during the first year a person lives in the District does not count toward meeting the durational residence requirement. *See* District of Columbia Handbook of Public Assistance Policies and Procedures, HPA II, EL 9.1, III, B, 3. As applied to appellee Barley, this regulation required that she must not only live in the District but prove her "mettle" by living on her own for eleven months (appellants count toward the one year requirement the month she lived in the District before entering the hospital—*see* A. 21) before she could receive assistance. Because she was without funds to support herself, enforcement of the regulation required her continued institutionalization. Such a subclassification of resident individuals which places additional restrictions on the payment of assistance to persons solely because they become dependent on state institutions during their first year in the District is without any rational justification and a manifest violation of the due process provision of the Fifth Amendment.

1. *The Effect of the Legislative Classification on the Appellees and the Class Which They Represent.*

a. The Right to Life

The central effect of the durational residence law is to threaten the most basic right of all, the right to life itself. Persons who apply for public assistance are, by definition, in economically desperate straits. Those without any means of financial support who are denied public assistance are being denied money payments which are used to provide the very basic essentials for subsistence. At worst, denial of assistance may lead directly to malnutrition, sickness and death. In other cases the results may be hardly less serious, placing in the balance "all that makes life worth living." *Ng Fung Ho* v. *White*, 259 U.S. 276, 284 (1922). As the court below noted:

> The spread over a year's time of the evils which public assistance seeks to combat may mean that aid, when it becomes available, will be too late: Too late to prevent the separation of a family into foster homes or Junior Villages; too late to heal sickness due to malnutrition or exposure; too late to help a boy from succumbing to crime (A. 64).[38]

[38] The economic hardships created by the durational residence law are made even more severe by the method of its application. Under Department of Public Welfare regulations in effect until the decision of the court below, a child moving to the District to join his mother had to satisfy the one year residence requirement whether or not his mother had already lived here a year and was receiving public assistance for herself and her other children. Furthermore, a child who was absent from the District for more than one year, with certain narrow exceptions, lost his residence and had to reside here a full year again in order to regain eligibility for assistance even though his mother never left the District. *See* Department of Public Welfare Handbook of Public Assistance Policies and Procedures, HPA II, §§EL 9.1, I, C; EL 9.1, III, B, 5. As previously noted, see fn. 14, *supra*, an infant born in the District would

The tragic effect of this denial of assistance was recently recognized in the report of the President's National Advisory Commission on Civil Disorders. In discussing the "most tension-producing statutory requirements" in the American public welfare system, the Commission stated:

> Third, in most states, there is a residency requirement, generally averaging around a year, before a person is eligible to receive welfare. These state regulations were enacted to discourage persons from moving from one state to another to take advantage of higher welfare payments. In fact, they appear to have had little, if any, impact on migration and have frequently served to prevent those in greatest need—desperately poor families arriving in a strange city—from receiving the boost that might give them a fresh start. *Report of the National Advisory Commission on Civil Disorders* (Bantam Books, Inc., New York, N.Y., 1968) at 459-60.

This description is borne out in the instant case. Appellee Harrell and her three children, prior to the entry of the preliminary injunction by the court below, were forced to live with her brother, his wife, and their six children in a four-bedroom house. She had to rely completely on a private charitable organization for food, hardly a dependable long-term arrangement. She was faced with the decision of whether to accept the Welfare Department's invitation to give up her children to the District of Columbia's Junior Village.[39] The plights of appellees Brown and

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not be eligible for assistance until its first birthday if, at the time of birth, its mother has not resided in the District for one year. See D.C. Code, §3-203(b).

[39] *See* appellee Harrell's Affidavit in Support of Motion for Preliminary Injunction at 2-4. *See also* Letter to Laurens Silver from

Legrant were equally desperate.[40] When a legislative classification has the effect of placing such additional burdens on a class of persons characterized by its extreme poverty and a practical inability to escape from the problems which the classification creates, the Court gives close scrutiny and requires full justification before permitting such a result. *See Griswold* v. *Connecticut, supra; Harper* v. *Board of Elections, supra; United States* v. *Carolene Prods. Co., supra; Skinner* v. *Oklahoma, supra.*

b. Freedom of Movement

The durational residence law precludes the payment of public assistance to any person who, within the past one year, has moved to the District of Columbia from another

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Jane Berry, dated April 20, 1967, which is attached to the *Harrell* complaint as Exhibit A and is part of the original record in this Court.

[40] Appellee Brown, in her Affidavit in Support of Motion for Preliminary Injunction, stated:

> My situation has never seemed so desperate. We have no money for shoes, for clothing of any sort. What furniture we have was left behind by the former tenant of our apartment. I do not know from month to month how I will be able to purchase food stamps. *Id.* at 4-5.

Appellee Legrant's Affidavit in Support of Motion for Preliminary Injunction stated:

> Our living situation right now is desperate since we will be forced to leave the apartment on Second Street any day. The conditions have been especially bad there since all but one of the other apartments have been vacated and boarded up. The roof leaks into the living room and the bathroom and there are many rats and roaches; but I and my children have no other place to go. . . . I have no money and no source of support . . . . I am frightened about the welfare of my children; I am concerned because we do not know where we are going to live and because we do not have enough money for food. *Id.* at 2-3.

The fourth appellee, Vera Barley, was not in these desperate economic straits because of her residence in a mental hospital. But

jurisdiction without regard to whether or not he is a permanent resident of this jurisdiction.[41] The net result of the law is to deny a statutory benefit to a class solely for the reason that its members have recently moved from some part of the United States to the District of Columbia. Because of the movement, the penalty of automatic ineligibility for public assistance is imposed.

Freedom of movement is, of course, a constitutionally protected right. Although there have been differences as to its precise source, *see United States* v. *Guest*, 383 U.S. 745, 759 (1966), its existence is no longer in dispute. *See Crandall* v. *Nevada*, 73 U.S. (6 Wall.) 35 (1868); *Edwards* v. *California*, 314 U.S. 160 (1941); *Kent* v. *Dulles*, 357 U.S. 116 (1958); *Aptheker* v. *Secretary of State*, 378 U.S. 500

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although her situation was not the economically precarious one usually faced by the newcomer seeking welfare assistance, she nevertheless was forced to remain in a mental hospital contrary to the advice of her doctors (A. 21).

[41] As the court below noted, "it is not disputed that the plaintiffs are bona fide domiciliaries of the District . . . ." (A. 70). There is no question that appellees, after they arrived in the District of Columbia, met the legal requirements of residence for other purposes. *See Kristensen* v. *McGrath*, 179 F.2d 796 (C.A.D.C. 1949); *District of Columbia* v. *Fleming*, 217 F.2d 18 (C.A.D.C. 1954); *D'Elia & Marks Co.* v. *Lyon*, 31 A.2d 647 (Mun. App. D.C. 1943). *See also* the Department of Health, Education and Welfare's Handbook of Public Assistance Administration which provides that a person

> shall be considered [for public assistance eligibility purposes] to have his residence at the place where he is living, if he is found to be living there voluntarily and not for a temporary purpose, that is, with no intention of presently removing therefrom. An intent to return to a place of former residence at some indefinite time in the future cannot be construed as meaning that he does not have residence at the place where he is currently living. Pt. IV, §3620.

See also Pt. IV, §3651.

(1964); *Zemel* v. *Rusk*, 381 U.S. 1 (1965). In *Aptheker*, the Court indicated that this freedom "is a constitutional liberty closely related to rights of free speech and association. . . . " 387 U.S. at 517.[42]

It is constitutionally irrelevant whether the durational residence law affects freedom of movement by directly barring the entry of a person or, as here, by imposing a penalty solely because the entry is made.[43] The imposition of a

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[42] In *Edwards* v. *California, supra,* Justice Jackson noted in a concurring opinion that the right of movement protected by the Constitution includes not only temporary travel but movement "for the establishment of permanent residence therein and for gaining resultant citizenship thereof." 314 U.S. at 183. It was movement for the purpose of settling in a new jurisdiction that appellees here were exercising.

[43] Either approach is likely to have the same effect on the class which appellees represent. A poor person who travels to Washington for the purpose of settling there cannot live without food to eat and shelter over his head. The inevitable effect of a law which denies assistance, no matter how desperately needed, simply because of recent settlement, is to pressure the individual to return to the place from which he came. *See Truax* v. *Raich, supra,* where the Court struck down as violative of equal protection a law which made it a crime for any company or individual employing more than five workers to have a labor force made up of less than 80% native born citizens of the United States or qualified electors. The Court stated: "The assertion of an authority to deny to aliens the opportunity of earning a livelihood when lawfully admitted to the State would be tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases they cannot live where they cannot work." 239 U.S. at 42. *See also* Supplement to Brief for Appellee on Reargument in *Edwards* v. *California, supra,* at 59-60, 66, 70-71, 74-75, 78, 81 & 83-84, which indicated that the usual method for enforcing the California law making it a criminal offense to assist a pauper to enter the state was to agree to suspend sentence on condition that the defendant would bring about the pauper's removal from the state. *Cf.* District of Columbia Department of Public Welfare, Handbook of Public Assistance Policies and Procedures, HPA II, AP 4.3, which details the procedure for transporting indigents out of the District and back to the state from which they came.

penalty on those who exercise a constitutional right may be no more permissible than to forbid a person to exercise the right in the first place. *See Harman* v. *Forssenius,* 380 U.S. 528, 540 (1965); *Sherbert* v. *Verner,* 374 U.S. 398, 406 (1963); *United States* v. *Jackson,* —— U.S. ——, 36 U.S.L. Week 4277 (1968). The Constitution protects against "sophisticated as well as simple-minded modes of discrimination." *Lane* v. *Wilson,* 307 U.S. 268, 275 (1939). Assuming that a penalty which is imposed on a class[44] because its members have exercised the right of movement is not *per se* unconstitutional, see *Zemel* v. *Rusk, supra,* at 14-16,[45] when the court judges the constitutionality of a law which necessarily has this effect, it should closely scrutinize such a classification and require that it be justified by substantial reasons.

c. The Right of Association

In addition to imposing a penalty on the exercise of freedom of movement, the durational residence law penalizes many persons who have exercised another fundamental freedom, the right of association. *See NAACP* v. *Alabama,* 357 U.S. 449 (1958); *Bates* v. *Little Rock, supra; Shelton*

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[44] That the classification in question here penalizes by denying a statutory benefit as opposed to a constitutional right does not make it any the less a penalty. *See Sherbert* v. *Verner, supra,* at 406. *See* section I.D.2.c., *infra.*

[45] The fact that the penalty of ineligibility for public assistance is imposed solely for the reason that appellees exercised the constitutional right of movement suggests that the classification might be unconstitutional, not only because it is unreasonably related to the statute's purposes, *see* section I.D., *infra,* but because the classification is *per se* unconstitutional. *See McLaughlin* v. *Florida, supra,* at 198 (Stewart, J., concurring).

v. *Tucker*, 364 U.S. 479 (1960); *Louisiana ex rel. Gremillion* v. *NAACP*, 366 U.S. 293 (1961); *NAACP* v. *Button*, 371 U.S. 415 (1963); *NAACP* v. *Alabama*, 377 U.S. 288 (1964); *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965); *Griswold* v. *Connecticut*, *supra*; *DeGregory* v. *Attorney General*, 383 U.S. 825 (1966); *Roberts* v. *Clement*, 252 F.Supp. 835, 848 (E.D. Tenn. 1966) (Darr, J., concurring). The relevance of the right of association to the durational residence law is particularly striking here. The desire to associate with family was a major reason for the decision of appellees Harrell and Brown to come to Washington.[46] Although the right of association which the Court has protected has taken many forms, none should be more worth protecting than the right of a person to associate with his family.[47] Like freedom of movement, a classification which has the effect of penalizing persons[48] because they have sought to enjoy the right of association may indeed be valid where the interest of the state is sufficiently compelling. But where such a right is necessarily involved, the state must do more than rest on the mere assertion that the classification is not patently arbitrary.

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[46] *See* fns. 7 and 12, *supra*.

[47] This fact is emphasized at the conclusion of the Court's opinion in *Griswold* v. *Connecticut*, *supra*: "Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions." 381 U.S. at 486.

[48] The persons penalized are not only the parents, but the children who, as in the case of Mrs. Harrell, were brought to Washington so that they could be close to the homes of their aunt and uncle who could help care for them. *See* fn. 7, *supra*.

2. *The Court Below Applied Correct Standards in Ruling That the Durational Residence Statute Violates Equal Protection.*

In ruling the durational residence law unconstitutional, the court below correctly recognized that

> the human terms of the problem permit the court somewhat greater latitude in deciding that this difference in the treatment of those in our midst who are in need amounts to unequal protection of the laws than if treatment were with respect to some matter less critical to their living conditions (A. 71).[49]

The foregoing analysis of the effect the durational residence law has on basic rights of the persons who come within its

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[49] Appellants find this reasoning to be the "basic flaw" in the court's opinion because "it ignores the constitutional standards applicable to benefit legislation and applies instead those applicable in cases which involve preferred freedoms." Brief for Appellants at 7. Appellants point to the court's reliance on *Sherbert* v. *Verner*, *supra*, as illustrative of its erroneous approach since *Sherbert*, unlike the instant case, according to appellants, involved the preferred rights of the First Amendment. With due respect to appellants' analysis, appellees suggest that it contains three basic flaws. First, it views incorrectly the facts of this case for, as indicated above, a number of fundamental rights are indeed involved here. Secondly, it views incorrectly the facts in *Sherbert*. Appellants imply that the unemployment insurance benefits in *Sherbert* were really not benefits at all since they were drawn from a fund to which the appellant (employee) in that case had contributed. On the contrary, South Carolina statutes provide that contributions to the unemployment insurance fund are made by the employer who is prohibited from deducting funds for this purpose from the employee's wages. *See* South Carolina Code, §§68-171; 68-201; 68-351; *Lumber Mut. Cas. Ins. Co.* v. *Stukes*, 164 F.2d 571 (C.A. 4, 1947). Thirdly, it views the law erroneously since *Sherbert* very definitely settled the question that a statute may not "be saved from constitutional infirmity on the ground that unemployment compensation benefits are not appellants' 'right' but merely a 'privilege.'" 374 U.S. at 404. *See* Section I.D.2.c., *infra*.

ambit clearly demonstrates that the court below was correct in requiring a compelling justification by the appellants to sustain the classification. Particularly should this be so in light of the nearly unanimous view of the courts that have recently considered the constitutionality of such requirements.[50] In addition to the decisions in *Thompson* v. *Shapiro*, 270 F.Supp. 331 (D. Conn. 1967) and *Smith* v. *Reynolds*, 277 F.Supp. 65 (E.D. Pa. 1967) which are now before the Court (Nos. 813 and 1138, Oct. Term, 1967), three-judge district courts have declared such laws unconstitutional in Delaware (*Green* v. *Department of Public Welfare*, 270 F.Supp. 173 (D. Del. 1967)) and Illinois (*Johnson* v. *Robinson*, —— F.Supp. —— (N.D. Ill. 1968)).[51]

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[50] In their Brief at p. 4, appellants note that "[u]ntil recently, the constitutionality of such provisions was seldom challenged, and such challenges as were made were uniformly rejected." The one case to which appellants refer, *People ex rel. Heydenreich* v. *Lyons*, 374 Ill. 557, 30 N.E. 2d 46 (1940), was indeed the *only* opinion of a court considering the constitutionality of welfare residence laws until the district court ruled in *Thompson* v. *Shapiro*, *supra*. This fact is not surprising in light of the general unavailability, until very recently, of lawyers to represent poor persons in civil litigation. *See Williams* v. *Shaffer*, *supra*, at 1041; *Snell* v. *Wyman*, *supra*, at n. 14. Although the *Lyons* case did sustain a durational residence requirement, appellees suggest that its two major foundations— 1) that since assistance is not a constitutional right, the state has a large degree of discretion when it elects to furnish it and 2) that the law represented a legitimate attempt to prevent Illinois from becoming a haven for the transient poor—have been completely eroded by more recent decisions of this Court. *See* section I.D., *infra*.

[51] *See also Smith* v. *King*, 277 F.Supp. 31 (M.D. Ala. 1967), now before this Court (No. 949, Oct. Term, 1967), where the court ruled that an Alabama welfare regulation which declared ineligible for AFDC those children whose mothers were engaging in nonmarital sexual relations was an arbitrary classification violative of equal protection. *And see* the decision just rendered in *Anderson* v. *Schaefer*, —— F.Supp. —— (N.D. Ga. 1968) in which a three-judge district court ruled unconstitutional under the equal protection clause that portion of a Georgia welfare regulation

In addition, preliminary injunctions enjoining statewide enforcement of durational residence laws have been granted in Wisconsin (*Ramos* v. *Health & Social Serv. Bd.*, 276 F.Supp. 474 (E.D. Wisc. 1967)),[52] Connecticut (*Alvarado* v. *Dunn*, Civil No. 12,399 (D. Conn. 1968)),[53] Maryland (*Mantell* v. *Dandridge*, Civil Action No. 18792 (D. Md. 1967)), and California (*Burns* v. *Montgomery*, Case No. 49018 (N.D. Cal. 1968)).[54]

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which provided that persons who obtain full-time employment are not eligible to have their wages supplemented by AFDC payments regardless of the amount of the wages whereas persons having part-time or irregular employment may have their wages supplemented by AFDC payments.

[52] Although the court has not entered a final order, in connection with the granting of the preliminary injunction, it wrote an opinion which stated that since the main issue was one of law, the decision on the preliminary injunction tended to be one on the merits and that a trial would only be held if any party believed that there were issues of fact to be considered or further argument required.

[53] The district court's judgment in *Thompson* v. *Shapiro*, *supra*, applied only to the named plaintiff. *See* Appendix to Appellant's Brief in *Shapiro* v. *Thompson*, No. 813, Oct. Term, 1967, at 37a. The order in *Alvarado*, although entitled "Temporary Restraining Order", is to remain in effect "during the pendency of this action or until further order of the court." *Id.* at 2.

[54] In addition, preliminary relief for the named plaintiff has been entered in cases challenging welfare residence laws in Arizona (*Porter* v. *Graham*, *supra*. *See* fn. 4, *supra*), Wisconsin (*Denny* v. *Health & Social Serv. Bd.*, Civil Action No. 67-C-426 (E.D. Wisc. 1967)) (a challenge to a general assistance residence law not involved in the *Ramos* suit), South Carolina (*Charles* v. *Rivers*, CA/67-849 (D. S.C. 1968)) (entered with the consent of attorneys for defendants), and Texas (*Alvarez* v. *Hackney*, Civil Action No. 68-18-SA (W.D. Texas 1968)). In Florida and Massachusetts, requests for preliminary relief in actions challenging durational residence laws have been denied, the Massachusetts court basing its ruling on the fact that no showing of irreparable damage was made by the plaintiffs who were receiving general public assistance for which there is no residence requirement. *Lamont* v. *Roberts*, No. 67-1056-Civ-CA (S.D. Fla. 1968); *Hatcher* v. *Ott*, Civil Action

D. The Statutory Purposes Which Allegedly Justify the Classification

As appellees pointed out in section I.A., *supra*, a statutory classification, to be sustained, must be "reasonable in light of [the statute's] purpose . . . ." *McLaughlin* v. *Florida, supra.* Before examining the supposed purposes of the durational residence requirement, which, according to appellants, justify the classification which so many courts have recently condemned, it is essential first to examine the general question of the technique used to search for a purpose[55]

No. 68-212-G (D. Mass. 1968). (The Florida court did not explain the basis for its order.) The only decision on the merits upholding the constitutionality of a durational residence law is *Waggoner* v. *Rosenn*, —— F.Supp. —— (M.D. Pa. 1968). In that case, involving a challenge to the same law that is before this Court in *Reynolds* v. *Smith*, No. 1138, Oct. Term, 1967, the Court, after the entry of a permanent injunction in *Reynolds*, dismissed the complaint. The opinion in *Waggoner* was written by the dissenting judge in *Reynolds*.

[55] It is important to keep in mind not only the supposed purposes of the durational residence provision but the more fundamental purpose of the overall statute, of which the durational residence section is only a small part. For if the supposed purpose of the provision in question here runs headlong into the primary purpose of the entire statute, this fact itself is good reason to examine the secondary purpose with great care and to determine whether "[o]ther means to accomplish secondary purposes must be sought" (A. 69). As the court below noted, the "basic purpose [of the public assistance statute], simply stated, is to aid members of the community who are in need" (A. 69). The provision of the District of Columbia Public Assistance Act which establishes the five basic categorical assistance programs states that the Commissioners shall "provide for maximum cooperation with other agencies rendering services to maintain and strengthen family life and to help applicants for public assistance and recipients to attain self-support or self-care . . . ." D.C. Code, §3-202 (b)(1). The federal statute which authorizes contributions to local AFDC programs makes the same point. Thus 42 U.S.C. 601 provides:

> For the purpose of *encouraging the care of dependent children in their own homes* or in the homes of relatives by enabling

with which to justify a statutory classification. Although it has often been stated that a justifying purpose may be found in any state of facts which reasonably can be conceived, *see Munn* v. *Illinois, supra,*[55] the Court has placed

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each State to furnish financial assistance and rehabilitation and other services . . . to needy dependent children and the parents or relatives with whom they are living *to help maintain and strengthen family life* and to help such parents or relatives to attain or retain capability for the maximum self-support and personal independence *consistent with the maintenance of continuing parental care and protection* . . . . (emphasis added)

Furthermore, mothers were deemed expressly to be the best judges of their children's interests, for Congress provided in 42 U.S.C. 606(b) that assistance payments in the AFDC program be in the form of money payments, as distinguished from voucher or vendor payments. The Department of Health, Education and Welfare has interpreted the money payment provision of the Social Security Act as follows:

> The right carries with it the individual's freedom to manage his affairs; to decide what use of his assistance check will best serve his interests; and to make his purchases through the normal channels of exchange, enjoying the same rights and discharging the same responsibilities as do friends, neighbors, and other members of the community. . . . a recipient of assistance does not, because he is in need, lose his capacity to select how, when, and whether each of his needs is to be met. *Handbook of Public Assistance Administration,* Pt. IV, §5120.

See also Pt. IV, §§3401, 4223.1, for a more detailed elaboration on the basic purpose of the AFDC program.

Thus, viewed in the context of the primary objectives Congress articulated in establishing the categorical assistance programs, it becomes obvious that the durational residence requirement results in restraining the mother's full exercise of her judgment concerning the proper environment for her children and further that its necessary effect could be institutionalization of children who had accompanied their parents to a new place of residence.

[55] As pointed out in fn. 29, *supra,* this test was developed in the context of cases challenging the power of the government to tax or regulate economic arrangements of businesses. A very different proposition is before the Court here.

limits on the way in which the search for the purpose may be conducted. Thus, where statutes explicitly declare their purpose, there is "no room to conceive of any other purpose for their existence." *Allied Stores* v. *Bowers*, 358 U.S. 522, 530 (1959). Likewise, where the purposes of a law, not obvious on its face, are stated by its framers or the state's representatives who are defending it, again there is no room left to conceive of any other purpose it may serve. *Martin* v. *Walton*, 368 U.S. 25, 28 (1961) (Douglas, J., dissenting); *Rinaldi* v. *Yeager*, 384 U.S. 305, 310 (1966); *McLaughlin* v. *Florida*, *supra*, at 193; *Griswold* v. *Connecticut*, *supra*, at 505 (White, J., concurring). *See also Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 169-70 (1963).[37]

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[37] In *Flemming* v. *Nestor*, 363 U.S. 603 (1960) the Court upheld the constitutionality of a provision of the Social Security Act which provided that OASDI benefits should be terminated in cases of aliens who were deported under Section 241(a) of the Immigration and Nationality Act (8 U.S.C. 1251(a)) on any of the grounds specified in the Social Security Act provision. *See* 42 U.S.C. 402 (n). The rational justification for the statute which the Court found was that the nation's economy would be benefited by the increased overall purchasing power resulting from taxing productive elements of the economy to provide payment to the retired and disabled who, because of their limited resources, would spend a comparatively large percentage of their payment. This advantage, the Court concluded, would be lost as to payments made to persons residing abroad. An examination of the Government's brief in this Court indicates that no such purpose was suggested and it does not appear on the face of the statute. *See* Brief for the Appellant in *Flemming* v. *Nestor*, No. 54, Oct. Term, 1959 at 70-76, 80-81. Thus, *Flemming* appears to take an approach contrary to the cases cited in the text. Appellees suggest that at least in a case in which fundamental rights are in contest and in which the government specifies the purposes of the statute in question, it is appropriate for the Court to avoid postulating rationales offered neither by the statute, its legislative history, nor its defenders, especially since appellees would have no opportunity to demonstrate that the suggested purpose has no relevance or rests on a supposed state of facts which does not exist.

Since the durational residence law does not on its face state the rationale for the classification, it is necessary to turn to justifications suggested by the framers of the law and by its defenders.

1. *Purposes Suggested by the Legislative History.*

A durational residence requirement in connection with a dependent children program first appeared in 1926 when the Congress enacted a statute to provide assistance to mothers of needy children. *See* 44 Stat. 758, D.C. Code, §8-91 (1929 Ed.).[58] Neither the 1926 law nor its revised form enacted in 1944, *see* 58 Stat. 277, D.C. Code, §32-753 (1940 Ed., Supp. VII), contain any legislative history suggesting a purpose of an AFDC durational residence law. The durational residence provision of D.C. Code. §3-203 was enacted by Congress in 1962 as part of a general consolidation in one title of all statutory provisions on public assistance. Since durational residence provisions were not new to the D.C. Code, it is not surprising that no purpose was mentioned by its authors except to make the residence requirement in all public assistance programs uniform in length. *See S. Rep.* 844, 87th Cong., 1st Sess. (1961), quoted at A. 59.

But residence provisions long antedate the categorical assistance programs established pursuant to the Social Security Act. They have their roots in the settlement system of the Elizabethan poor laws which sought to remove paupers to the jurisdictions which had the responsibility

[58] The 1926 program preceded by nine years the federal AFDC plan enacted as part of the Social Security Act of 1935.

for supporting them.[59] It is safe to assume that this historic purpose is at the heart of the District's provision as well.[60]

2. *Purposes Suggested by Appellants.*

a. Preventing Migration of Paupers to the District of Columbia.

In the court below, appellants offered as a rational justification for the durational residence law, the need to protect the funds appropriated for welfare assistance from being drained by persons migrating to the District of Columbia for the purpose of obtaining higher welfare payments.[61] In more abbreviated fashion, appellants make the

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[59] The development of settlement laws is documented in Mandelker, *The Settlement Requirement in General Assistance I*, 1955 *Wash. U.L.Q.* 355; Mandelker, *The Settlement Requirement in General Assistance II*, 1956 *Wash. U.L.Q.* 21; Mandelker, *Exclusion and Removal Legislation*, 1956 *Wis. L. Rev.* 57. When the settlement system was incorporated into the laws of the American colonies, the purpose it served became twofold. Since there was no uniform law for poor relief in America as there had been in England, the settlement laws not only shifted the responsibility for caring for poor persons, but also prevented paupers from entering communities which were hostile to them. *See* Falk, *Settlement Laws—A Major Problem in Social Welfare* (American Association of Social Workers, New York, 1948).

[60] Although there is an absence of legislative history stating the purpose of the District's durational residence law, the traditional purpose of such laws was alluded to in the Congressional debates over the provisions of the Social Security Act imposing maximum periods of residence which the states could require as conditions for applying for public assistance and still remain eligible for federal matching payments in the categorical assistance programs. *See Hearings before the Committee on Ways and Means, House of Representatives*, 74th Cong., 1st Sess. on H.R. 4120, at 830; 79 *Cong. Rec.* 6062 (1935).

[61] *See Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion for Preliminary Injunction and in Support of Defendants' Motion to Dismiss, or in the Alternative, for Summary Judgment*, which is part of the original record in this Court, at 14-16.

same justification argument here. *See* Brief for Appellant at 9.[42] This suggested purpose fits well with the historical facts.[43] But for several reasons, it may not be invoked to save the statute.

First, as the court below emphasized (A. 66), this purpose merely restates the premise of the Elizabethan Poor Laws which enshrine the notion of settlement. But, as this Court has pointed out:

> the theory of the Elizabethan Poor Laws no longer fits the facts. Recent years, and particularly the past decade, have been marked by a growing recognition that in an industrial society the task of providing assistance to the needy has ceased to be local in character. *Edwards* v. *California, supra,* at 174-75.

In *Edwards,* California, too, was concerned about the huge influx of migrants into its territory. Nevertheless, the Court struck down a law expressly designed to curb the migration of paupers. In doing so, the Court noted:

> It is frequently the case that a State might gain a momentary respite from the pressures of events by the simple expedient of shutting its gates to the outside world. But, in the words of Mr. Justice Cardozo: "The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several States must sink or swim together, and that in the long

[42] The dissenting opinion below stated that the "manifest purpose of the legislation is to prevent a particular State or District from becoming a Mecca for migrants from other states where relief payments are smaller" (A. 82).

[43] See the Mandelker articles cited in fn. 59, *supra.*

run prosperity and salvation are in union and not division." *Baldwin* v. *Seelig*, 294 U.S. 511, 523. 314 U.S. at 173-74.

Clearly then, *Edwards* establishes that the object of deterring indigents from migrating to the District of Columbia is an unlawful governmental objective and hence may not be invoked to justify the statute. *Bolling* v. *Sharpe*, *supra*, at 499-500; *Griffin* v. *County School Bd.*, 377 U.S. 218, 231 (1964); *Truax* v. *Raich*, *supra*, at 421. Compare *Toomer* v. *Witsell*, 334 U.S. 385 (1948).

Secondly, the interests of appellants in protecting the drain of welfare funds through the use of a durational residence test seems less than persuasive in light of three District of Columbia practices. Pursuant to the Department of Public Welfare Handbook of Public Assistance Policies and Procedures, HPA II, AP 4.5, I, assistance is granted to persons formerly residing in the District who have severed all ties with the jurisdiction and moved elsewhere. These payments are made until the individuals have satisfied any durational residence requirements imposed by the state to which they have migrated. Furthermore, in the case of appellee Barley, the cost to the District of maintaining her at St. Elizabeth's Hospital was in excess of $370 per month, compared with approximately $110 per month that she would have received in public assistance funds if she had been declared eligible and placed in a foster home.[44] Finally, although D. C. Code, §3-203(b) pre-

[44] *See* Letter to Mr. Joseph Dugan, from E. J. Brown, dated July 6, 1967, and Opinion of Charles Duncan, Corporation Counsel, dated Jan. 18, 1967. These documents are attached to the complaint in the *Barley* case as Exhibits G and H and are part of the original record in this Court.

cluded the granting of public assistance to one of appellee Brown's children until his first birthday since, at the time of his birth, his mother had not lived in the District one year (*see*, fn. 14, *supra*), appellants will nevertheless care for this child at an institution without regard to his mother's length of residence.[65] D. C. Code, §3-126(3). The cost to the District for institutional care far exceeds the cost in giving the parent public assistance for the child.[66] Yet appellants seek to justify durational residence on budgetary grounds although denying aid for a year may make it "[t]oo late to prevent the separation of a family into foster homes or Junior Villages" (A. 64).[67]

Thirdly, this supposed purpose depends on the validity of a state of facts which has been totally unproved by

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[65] Likewise, until such time as the children of appellees Harrell and Legrant satisfied the one year durational residence requirement, the District would have institutionalized them if necessary. *See* fn. 39, *supra*, and accompanying text.

[66] *A Report to the Subcommittee on the District of Columbia, Committee on Appropriations, U.S. Senate*, entitled "Review of Policies and Procedures Concerning Admissions to and Discharges From Junior Village," prepared by the Comptroller General of the United States, dated February 12, 1964 (printed in *Hearings before the Subcommittee on the District of Columbia, Committee on Appropriations*, U.S. Senate, on HR 10199, D.C. Appropriations Act for 1965, 88th Cong., 2d Sess., Vol. II, 1401 *et seq.*) stated that in 1964 the total cost of operating Junior Village was $2,777,000. The monthly average cost per child for 1964 was $250.80 (1403). This cost has not appreciably declined during the last four years. By contrast, the cost in AFDC payments to maintain a child with his parent, taking into account his pro rata share of the shelter allowance available for the whole family, would be no more than $50 per month. *See* District of Columbia Handbook of Public Assistance Policies and Procedures, HPA II, RQ 2.1.

[67] In the case of appellee Harrell, appellants refused to grant her public assistance and yet "told me I could give my children to Junior Village where the District of Columbia government would pay for their keep." *See* appellee Harrell's Affidavit in Support of Motion for Preliminary Injunction at 4.

appellants.[68] Thus, appellants have assumed that absence of a durational residence law would lead to an assault on the District's treasury by persons flooding the jurisdiction in order to obtain welfare funds. Not a shred of evidence to support this notion was introduced in the court below or has been suggested in appellants' brief here.

As the Court noted in *United States* v. *Carolene Prods. Co., supra*:

> Where the existence of a rational basis for the legislation whose constitutionality is attacked depends upon facts beyond the sphere of judicial notice, such facts may properly be made the subject of judicial inquiry, . . . and the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist. 304 U.S. at 153.

Surely the supposed state of facts offered by appellants may not be made the subject of judicial notice. Thus, it is appropriate for a court to inquire into the validity of the asserted hypothetical facts and determine whether there is "evidence to dispel them." *McGowan* v. *Maryland*, 366 U.S. 420, 427 (1961).[69]

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[68] The court below noted this fact in stating: "Another difficulty in accepting the protective assumption as giving constitutional support to the challenged provision, is the speculative character of the assumption from a factual standpoint" (A. 67).

[69] *See also Busey* v. *District of Columbia*, 138 F.2d 592 (C.A. D.C. 1943), where the court noted that when legislation appears on its face to effect fundamental freedoms and the law's validity

> depends upon the existence of facts which are not proved, their existence should not be presumed; at least when their existence is hardly more probable than improbable, and particularly when proof concerning them is more readily available to the government than to the citizen. The burden of proof in such a case should be upon those who deny that these freedoms are invaded. 138 F.2d at 595.

As the court below found (A. 67), the available evidence points in precisely the opposite direction of appellants' supposed facts.[10] Hence, they may not be relied on as

[10] Available studies concerning the reasons for movement by lower socio-economic strata, including one by the District of Columbia Department of Public Welfare, indicate that people do not move for purposes of obtaining higher public assistance payments. Rather they move for a complex of reasons, the most common relating to promises of employment and the presence of relatives in the state of in-migration. *See* Tilly, "Race and Migration to the American City", *The Metropolitan Enigma* (James Wilson, Ed.) (Chamber of Commerce of the U.S. 1967) 129-30. (This study was attached as Appendix I to *Memorandum in Support of Plaintiffs' Counter-Motion for Summary Judgment and Supplemental Memorandum in Support of Plaintiffs' Motion for Preliminary Injunction and Prayer for Permanent Injunctive Relief*, and is part of the original record in this Court.) For a detailed listing of twenty-four "migration stimulating situations" *see* Bogue, D., "Internal Migration", *The Study of Population* (P. Hauser and O. D. Duncan, Ed.) (University of Chicago, 1959), 251; Bogue, D., *Population of the United States* (Glencoe, Illinois, Free Press, 1959), 416-418. For general observations tracing patterns of movement from the rural South by Negroes see Hauser, P., "Demographic Factors in the Integration of the Negro," *Federal Role in Urban Affairs, Hearings before the Subcommittee on Executive Reorganization of the Committee on Government Operations, U.S. Senate*, 89th Cong., 2d Sess., Pt. 14, 3000 (1966).

For similar conclusions concerning the reasons for interstate migration, *see* U.S. Department of Commerce, Area Redevelopment Administration, *The Geographic Mobility of Labor: A Summary Report* (September, 1964); U.S. Department of Commerce, Area Redevelopment Administration, *The Propensity to Move* (July, 1964); U.S. Department of Commerce, Area Redevelopment Administration, *Migration Into and Out of Depressed Areas* (September, 1964). *The Geographic Mobility of Labor* study was based on a scientifically selected sampling involving over 3000 interviews. This study revealed that 18% of all most recent moves were for the purpose of obtaining steadier work or moving because of unemployment, 17% were to obtain a better or higher paying job, 16% were due to transfers and reassignments, 12% were due to starting or leaving school or military service, and 22% were for family reasons. Of this last category,

> [m]ost of the moves were made to be closer to relatives, either out of a general desire to be near relatives, or because of health considerations, or a death in family . . . . The total number of

support for the proposition that the durational residence law is a valid classification because it prevents migration for purposes of obtaining public assistance."[11]

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moves increases with education, as previously shown, but the proportion of moves which are at least in part for family reasons falls from 39% for the poorly educated to 11% for the college graduates. *Id.* at 19-20.

Studies in individual states reach the same conclusions. In a study entitled *The Movement of Population and Public Welfare in New York State*, New York State Department of Social Welfare (1958), analyzing the state case load in 1957 with respect to recent arrivals in the state within the last year, it was concluded that (at 2)

> states with high residence requirements for public assistance and care get, not less, but more in-migration than New York State. Among the states showing the largest net civilian in-migration are California, Florida, Michigan, Ohio, Arizona, and Maryland, all of which have very high residence requirements. New York State, without residence requirements, shows only a small gain.

The study also concluded that, from facts available to the New York State Department of Social Welfare,

> public welfare residence laws neither attract nor deter people from moving to a specific State. Studies show that they move for employment, for better economic opportunities, for better educational opportunities for their children, for better living conditions, for a better climate, and to join relatives and friends. *Id.*

[11] This conclusion was confirmed in Kasius, "What Happens in a State Without Residence Requirements", in *Residence Laws: Road Blocks to Human Welfare* (1956) at 19-20; *State of New York, Moreland Commission on Welfare, Public Welfare in the State of New York* (1963) at 27-28; Falk, *Social Action on Settlement Laws*, 18 *Soc. Serv. Rev.* 288 (1944); Hyde, *The Trouble with Residence Laws*, 16 *Public Welfare*, 103, 105 (1958). *See also 1967 Report of the Committee on Labor and Public Welfare, U.S. Senate*, 90th Cong., 1st Sess.: *The Migratory Farm Labor Problem in the United States*, at 42-43. The Rhode Island experience is the same. *See* Leet, *Rhode Island Abolishes Settlement*, 18 *Soc. Serv. Rev.* 281 (1944), where the author states that "to date, the Division of Public Assistance [in Rhode Island] has been unable to locate a single individual who has moved into the state in order to secure assistance." *Id.* at 283. The Greenleigh Report on ADC in Cook County,

b. An Objective Test of Residence

As a second justification for the durational residence law, appellants suggest that in light of the "well-known problems" of determining whether a person is a resident, it

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Illinois' (*Facts, Fallacies, and Future* (Greenleigh Associates, 1960)) concluded that the 24,000 families receiving Cook County ADC were not newcomers: 90% had lived in the state for five years or more; 25% of the mothers and 75% of the children were born in Illinois. AFDC mothers from outside had come to take a job (18%), to be with their husbands (22%), or to join relatives (38%), not to obtain public assistance. Furthermore, only 100 of the 2400 migrant families had received public assistance in the state of origin during the five year period before they came.

Finally, it is most extraordinary that appellants have raised the spectre of an influx of indigents migrating into the District of Columbia, since an official study of the District of Columbia Department of Public Welfare, "Children in Need in the District of Columbia" (October, 1954), reprinted in *Problems of Hungry Children in the District of Columbia, Hearings before the Subcommittee on Public Health, Education, Welfare, and Safety of the Committee on the District of Columbia, U.S. Senate*, 85th Cong., 1st Sess. (1957) 515 concluded that "figures relating to place of birth and migration of mothers and children support the belief that few if any families either white or Negro, move into the District for the purpose of obtaining public assistance." *Id.* at 523. Of AFDC mothers on the rolls during January, 1952 only 2% had resided in the District for less than three years at the time of the study and all but 106, or 6.6%, had resided in the District for at least five years. *Id.* at 521. Further, it was concluded that

> [g]oing back to the first time each mother received either ADC or home care the record indicates that, of the 1822 mothers, 47 or 2.6% received assistance their second year in the District; 70 others or 3.8% in their third year; 77 or 4.2% in their fourth, and 82 or 4.5% in their fifth year. The total who received assistance in their first five years of District residence was 358, or 19.6%. *Id.* at 521.

[11] As the court below noted (A. 68), the facts of this case lend no support to the argument that persons migrate in order to obtain public assistance. If appellants are really concerned with the problem of transients entering the District for the purpose of claiming assistance, they should adopt means appropriate to this end. *See infra.*

is within the legislative discretion to enact an objective test that a person who has resided in the District for one year is a resident for the purposes of public assistance. (Brief for Appellant at 10.) The difficulty with this argument is that it places administrative convenience ahead of constitutional rights. Where, as here, fundamental rights are in the balance, a legitimate goal of determining whether a person is in fact a resident[72] must be achieved by means "narrowly drawn to prevent the supposed evil . . . ." *Cantwell* v. *Connecticut*, 310 U.S. 296, 307 (1940). For, as the Court stated in *Aptheker* v. *Secretary of State, supra*, "precision must be the touchstone of legislation so affecting basic freedoms . . . ." 378 U.S. at 514. Accord *NAACP* v. *Button, supra; Louisiana ex rel. Gremillion* v. *NAACP, supra; Shelton* v. *Tucker, supra; NAACP* v. *Alabama, supra*, 377 U.S. at 307; *Dombrowski* v. *Pfister, supra*, at 486; *Keyishian* v. *Board of Regents*, 385 U.S. 589, 603-04 (1967).

The durational residence statute, however, sweeps before it all persons who have been in the District for less than a year without any effort to sort out those persons who are clearly residents. As the court in *Green* v. *Department of Public Welfare, supra*, stated:

> we think that the one year period is a constitutionally unreasonable test for determining the "intention" aspect of domicile, assuming such was its purpose. More accurate alternatives are available to ascertain an individual's true intentions without exacting the protracted waiting period with its dire economic and social

[72] Appellees do not contend and the court below did not rule that persons who are not *bona fide* residents of the District of Columbia must be paid public assistance (A. 70).

consequences to certain individuals living in the state. 270 F.Supp. at 177-78."

Although the durational residence law might well be an administrative convenience, the Court has ruled in an analogous situation that such an excuse will not save the statute. In *Harman* v. *Forssenius, supra,* the Court declared unconstitutional under the Twenty-Fourth Amendment a Virginia law which provided that in order to qualify to vote in a federal election, one must either pay a poll tax or file a witnessed or notarized certificate of residence. The state sought to justify the law on the ground that its certificate was a necessary method of proving residence of those persons who, by virtue of the Twenty-Fourth Amendment, could vote in a federal election in Virginia without paying the poll tax. But the Court ruled that this "remote administrative benefit," namely demonstrating residence, did not justify the constitutional deprivation involved. 380 U.S. at 542. See also *Carrington* v. *Rash, supra,* at 96; *Oyama* v. *California,* 332 U.S. 633, 646-47 (1948); *Rinaldi* v. *Yeager, supra,* at 310.

c. Public Assistance Is a Gratuity

Finally, appellants suggest as a general justification for the statutory scheme the fact that since public assistance payments are mere non-contractual benefits, they must

be viewed in light of the Court's pronouncement in *United States* v. *Cook,* 257 U.S. 523 (1922), that:

"... Congress in shaping the form of its bounty may impose conditions and limitations on its acquisition

[18] As noted in fn. 41, *supra,* appellees satisfy legal requirements of residence for all other purposes.

> and enjoyment by the beneficiaries *which it could not impose on the use and enjoyment by them of a vested right.*"

257 U.S. at 527 (emphasis added) (Brief for Appellants at 6-7).[74]

Whatever may have been the law at one time with respect to the right of government to justify infringement of constitutional rights on the ground that the infringement relates to a benefit which the government does not have to give in the first place, this view has long since been rejected. *Sherbert* v. *Verner, supra,* at 404; *Keyishian* v. *Board of Regents, supra,* at 605-06; *Schware* v. *Board of Bar Examiners,* 353 U.S. 232, 239 (1957); *Garrity* v. *New Jersey,* 385 U.S. 493 (1967); *Spevack* v. *Klein,* 385 U.S. 511 (1967); *Simmons* v. *United States,* 88 Sup. Ct. 967 (1968).[75] Any suggestion to the contrary in *Flemming* v. *Nestor, supra,*[76] *see* (A. 81) has been superseded by more recent decisions of the Court.[77]

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[74] This justification, rather than being suggestive of a purpose of the durational residence test, is rather one which argues that no purpose at all need be offered to justify a statutory classification relating to a benefit as opposed to a right.

[75] In the one case that has squarely considered the unconstitutional condition doctrine in the context of public assistance, the court rejected the notion that "the power of government to decline to extend to its citizens the enjoyment of a particular set of benefits . . . embrace[s] the supposedly 'lesser' power to condition the receipt of those benefits upon any and all terms." *Parrish* v. *Civil Serv. Comm.,* 425 P.2d 223, 230 (Sup. Ct. Cal., 1967). *See also Collins* v. *State Bd.,* 248 Iowa 369, 81 N.W. 2d 4 (1957).

[76] Appellants, both in the court below and here, have placed great reliance on *Flemming* v. *Nestor, supra.* Whether or not the standard set forth by the Court in *Flemming* for judging the constitutionality of conditions attached to a statutory grant has been super-

In summary, the various purposes for the classification revealed by the statute, its history, and the suggestions of appellants are either unlawful purposes *per se*, ones that

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seded by more recent cases, *Flemming* is clearly distinguishable. First, that case involved a discrimination between residents and non-residents, not one between two groups of residents, a classification which the Court has traditionally examined with close scrutiny. *See e.g., Truax* v. *Raich, supra; Oyama* v. *California, supra.* Secondly, *Flemming* involved a deported alien, not a citizen. The power of Congress to prescribe the means and circumstances under which aliens may be deported has traditionally been construed extremely broadly. *See Galvin* v. *Press*, 347 U.S. 522 (1954) and the cases cited therein. In its brief in *Flemming*, the Government placed great reliance on the fact that the statutory classification involved non-resident aliens. *See* Brief for Appellant in *Flemming* v. *Nestor*, No. 54, Oct. Term, 1959, at 45-53, 71-73. Thirdly, the rational justification offered in support of the statute's constitutionality simply has no application here. The Court in *Flemming* was concerned about a loss to the American economy because funds were spent in another country. Obviously, welfare payments made to appellees and the class they represent will be spent not only in this country but in all likelihood in the District of Columbia since persons poor enough to qualify for this aid are unable to save any substantial portion of it to spend at a later date in another jurisdiction.

[77] Appellants, in the court below, cited 42 U.S.C. 602(b) as lending support to the argument that a durational residence test is a reasonable condition. That section provides that the Secretary of Health, Education, and Welfare shall not approve any state plan which imposes as a condition of eligibility for AFDC a durational residence requirement of more than one year. *See also* 42 U.S.C. §§302(b), 1202(b), 1352(b) and 1382(b) which impose limitations on durational residence requirements for OAA, AB, and APTD. But, as the language of these provisions makes apparent, they express no ringing approval of durational residence tests. Their legislative history suggests that Congress, while desiring not to encroach unreasonably on the right of the states to set eligibility requirements for public assistance, nevertheless thought existing durational residence laws were excessive. The result of these two conflicting concepts was a compromise which permitted federal funds to be contributed to states with residence requirements but placed restrictions on the required length of residence. *See S. Rep.* 628, 74th Cong., 1st Sess. 4, 35 (1935); *Hearings before the Committee on Finance, U.S. Senate*, 74th Cong., 1st Sess., on S. 1130,

must be accomplished by narrower means, or are factually untrue. Hence none of them may be invoked to save the classification on the ground that it is reasonably related to the accomplishment of these purposes. Since there are no purposes remaining to justify the classification, it must fall as an arbitrary one prohibited by the equal protection guarantees of the Fifth Amendment.[78]

192, 633; *H. Rep.* 615, 74th Cong., 1st Sess. 23 (1935); *Hearings before the Committee on Ways and Means, House of Representatives,* 74th Cong., 1st Sess., on H.R. 4120, 830; 79 *Cong. Rec.* 5602 (1935). In light of the express language and history of these Social Security Act provisions, the statement of the dissenting opinion below that the District law "was expressly authorized by the Social Security Act" (A. 73) is hardly an accurate description. Therefore, the dissenting opinion's conclusion that a ruling that the District's provision is unconstitutional "strike[s] down in its wake . . . the Social Security Act authoriz[ation]" (A. 73) does not follow. Should the Court affirm, these Social Security Act provisions, while remaining on the books, will simply no longer be needed since the problem they sought to minimize will have been eliminated.

[78] Two other conceivable purposes for the classification, neither of them suggested by counsel for appellants, the statute, or its legislative history, are that 1) the statute tends to assure eligibility for benefits and thereby avoids payments tainted with fraud and 2) the statute, by not giving benefits until the second year of residence, enables the legislature to better predict the amount of funds needed for the following year's welfare budget. The first argument, which was rejected by the court in *Green* v. *Dept. of Public Welfare, supra,* at 177, was possibly a concern of the dissenting opinion in the court below. *See* A. 74. An identical argument was suggested to the court in *Sherbert* v. *Verner, supra.* In rejecting it, the court noted a) that the argument had not been made in the court below and "we are unwilling to assess the importance of an asserted state interest without the views of the state court." 374 U.S. at 407; b) even if the contention had been made below, the record would not have sustained it; and c) it is doubtful whether such evidence, even if it existed, would be sufficient to warrant substantial infringement of the constitutional rights involved for:

> [e]ven if the possibility of spurious claims did threaten to dilute the funds and disrupt the scheduling of work, it would

II.

The Durational Residence Requirements of D.C. Code, §3-203 Are Distinguishable From Durational Residence Requirements in Other Areas of the Law.

Appellants argue that an affirmance of the decision below will undermine the validity of durational residence requirements in all other areas of the law. *See* Brief for Appellants at 9-10.[79] An examination of the nature and purpose of these other types of durational residence requirements demonstrates, however, that no such result follows since those provisions are fundamentally different from the provisions involved here.

A. Other Types of Durational Residence Requirements.

Although varying substantially from state to state, most durational residence laws not relating to public assistance appear to fall into four general categories—voting, public office, divorce and licensing. Courts which have considered

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plainly be incumbent upon the appellees to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights. 374 U.S. at 407.

All three of these reasons apply here.

The second argument was offered by the dissenting judge in the lower court in *Smith* v. *Reynolds, supra,* as the " 'state of facts [which] reasonably may be conceived to justify' the challenged statutory discrimination. . . . " 277 F.Supp. at 71. As the appellees' brief in this Court in *Reynolds* makes clear (*see* section II. C. of the Brief for Appellees in No. 1138, Oct. Term, 1967), this suggested purpose was, *inter alia,* factually disproved in the trial court. In any event, it has never been suggested by appellants here.

[79] *See also* the dissenting opinion of Judge Clarie in *Thompson* v. *Shapiro, supra,* at 340, and the dissenting opinion of Judge Holtzoff in the instant case at A. 83.

the legality of such requirements in each of these areas have reached varying results, generally upholding them but occasionally declaring them invalid, especially in the licensing area. In reaching their results, the courts have recognized that all durational residence requirements are not similar and each type requires a different analysis.

States typically impose durational residence requirements for voting in both local and federal elections.[80] This Court recently reaffirmed the validity of such requirements in a *per curiam* opinion in *Drueding* v. *Devlin*, 380 U.S. 125 (1965). See also *Pope* v. *Williams*, 193 U.S. 621 (1904). They have been justified on the ground that the state has a legitimate interest in protecting the voting process from new residents who have no familiarity with the issues or the candidates, but who nonetheless may decisively affect the outcome of an election. *Wright* v. *Blue Mountain Hosp. Dist.*, 214 Ore. 141, 328 P.2d 314 (1958); *Estopinal* v. *Michel*, 121 La. 879, 46 So. 907 (1908); *Shaeffer* v. *Gilbert*, 73 Md. 66, 20 Atl. 434 (1890). Another purpose of these laws is to provide a means of identifying voters and protecting against fraud. *People ex rel. Agnew* v. *Graham*, 267 Ill. 426, 108 N.E. 699 (1915); *Howard* v. *Skinner*, 87 Md. 556, 40 Atl. 379 (1898); *Shaeffer* v. *Gilbert*, *supra*. Durational residence requirements for voting may further be justified on the ground that Article I of the Constitution gives the states "broad powers to determine the conditions under which the right of suffrage may be exercised . . . absent of course, that discrimination which the Constitution con-

[80] Pursuant to the authority of the Twenty-Third Amendment, the Congress has imposed a one year durational requirement upon residents of the District of Columbia who wish to vote for presidential and vice-presidential electors. D.C. Code, §1-1102.

demns." *Lassiter* v. *Northampton Election Bd.*, 360 U.S. 45, 50-51 (1959).

But even in the voting area, the power to impose durational residence provisions has its limits. Thus, in *Carrington* v. *Rash, supra,* the Court struck down a provision of the Texas Constitution which prohibited any member of the armed forces who moves his home to Texas during the course of his military duty from ever voting in any election in Texas so long as he is a member of the armed forces. The Court held that disenfranchisement of military persons, regardless of the length of their residence in the state, constituted an arbitrary discrimination against that group of residents. The lesson of *Carrington* is that even in an area where durational residence tests are normally upheld as reasonably related to legitimate state interests, there are limits beyond which the requirement will be stricken as an arbitrary classification.[81]

Closely related to the durational residence requirements for voting are those for holding elected or appointed public office.[82] Such requirements are found in provisions of Articles I and II of the Constitution listing qualifications

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[81] The type of discriminatory classification condemned in *Carrington* is very analogous to the one here. The Texas law made no attempt "to determine the bona fides of an individual claiming to have actually made his home in the State long enough to vote. . . . All servicemen not residents of Texas before induction came within the provision's sweep." 380 U.S. at 95-96. It was this lack of precision which brought about the statute's downfall. Appellants' attempt to defend the District's durational residence test by making essentially the same argument—that the provision is really an objective test of residence. But this argument contains the identical defect of the statute in *Carrington*, namely that it precludes *any* person residing here less than a year from demonstrating residence. *See* Section I.D. 2.b., *supra*.

[82] *E.g.* D.C. Code, §§11-2301 and 2-701, and §201(b) of the President's Reorganization Plan No. 3 of 1967.

for Representatives, Senators and the President. There are few court decisions directly considering the validity of such state requirements. See *People ex rel. Hoyne* v. *McCormick*, 261 Ill. 413, 103 N.E. 1053 (1913); *Sheehan* v. *Scott*, 145 Cal. 684, 79 Pac. 350 (1905); *Evansville* v. *State*, 118 Ind. 426, 21 N.E. 267 (1889). *State ex rel. Holt* v. *Denny*, 118 Ind. 449, 21 N.E. 274 (1889). The policy reasons for these requirements are similar to those in the voting area, namely that a person seeking or eligible for public office, even more than a voter, must have a close familiarity with the community and governmental unit within which he will exercise his power. *Sheehan* v. *Scott, supra*, 145 Cal. at 687, 79 Pac. at 351.

Virtually all of the states have durational residence requirements for obtaining divorces.[83] They have been upheld when attacked as violating provisions of the Fourteenth Amendment. *Hensley* v. *Hensley*, 286 Ky. 378, 151 S.W. 2d 69 (1941); *Worthington* v. *District Court*, 37 Nev. 212, 142 Pac. 230 (1914). The Courts have justified them on the grounds that they are necessary to insure that defendants receive adequate notice, *Roberts* v. *Roberts*, 144 Tex. 603, 192 S.W. 2d 774 (1946); to prevent nonresidents from using the state as a dumping ground for the marital troubles of other states, *Holman* v. *Holman*, 35 Tenn. App. 273, 244 S.W. 2d 618 (1951); and to protect the interest of society against hastily brought suits, *Roberts* v. *Roberts, supra; Aucutt* v. *Aucutt*, 122 Tex. 518, 62 S.W. 2d 77 (1933). Furthermore, social policy supports the imposition of durational residence requirements for obtaining divorces. Such

[83] *See* Am. Jur. 2d Desk Book Doc. No. 125 and Supp. In the District of Columbia, one of the parties to the marriage must have been a "bona fide resident" for the one year preceding the commencement of the action. D.C. Code, §16-902.

a requirement may promote the stability of families in the jurisdiction. As the Court below noted (A. 64), a durational residence requirement for obtaining public assistance payments may lead to precisely the opposite result by encouraging breakdown of existing family units.

Finally, residence in a jurisdiction for a certain period may be a condition for obtaining a license to engage in a profession or operate a particular type of business.[84] Such requirements have been invalidated by several courts under the privileges and immunities clause of Article IV, Section 2 and the due process and equal protection clauses of the Fourteenth Amendment. *Mercer* v. *Hemmings*, 194 So. 2d 579 (Fla. 1966), appeal dis. 389 U.S. 46 (1967); *New Brunswick* v. *Zimmerman*, 79 F. 2d 428 (C.A. 3, 1935); *Williams* v. *McCartan*, 212 Fed. 345 (W.D.N.Y. 1914); *State* v. *Pennoyer*, 65 N.H. 113, 18 Atl. 878 (1889); *In re Watson*, 15 Fed. 511 (D. Vt. 1882); *Wormsen* v. *Moss*, 177 Misc. 19, 29 N.Y. Supp. 2d 798 (1941).[85] But even in this area, there may be a basis for justifying durational residence requirements because of the strong interest of the state in upholding standards of professional persons and others who offer their services to the general public and who occupy special

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[84] *E.g.* D.C. Code, §2-915. (Requirement of one year's residence or employment in the District of Columbia to obtain a certificate as a public accountant.)

[85] In the *Wormsen* case, involving a New York City ordinance requiring that applicants for a license to operate massage parlors must have been United States citizens for two years, the court ruled (per Bernstein, J.):

> . . . it is clearly unreasonable and arbitrary to apply a test of qualification for a private calling on the basis that one has been a citizen for two years and another for but a year and eleven months. Such a test is a discriminatory one in that, as Judge Cardozo said, it "create[s] a privileged caste among the members of the state." *People* v. *Crane*, *supra*, 214 N.Y. at page 167 . . . 29 N.Y. Supp. 2d at 803.

positions of trust and confidence. See *La Tourette* v. *McMaster*, 248 U.S. 465 (1919); *State ex rel. Walker* v. *Green*, 112 Ind. 462, 14 N.E. 352 (1887). Compare *Dent* v. *West Virginia*, 129 U.S. 114 (1889); *Graves* v. *Minnesota*, 272 U.S. 425 (1926); *Schware* v. *Bd. of Bar Examiners*, *supra*; *Martin* v. *Walton*, *supra*.

B. The Uniqueness of Public Assistance Durational Residence Laws

The foregoing analysis reveals the striking contrast, in terms of purpose and effect, between durational residence laws in welfare and those in other areas. First, durational tests in these other areas are tailored to accomplish substantial state objectives such as assuring a more informed electorate or guaranteeing the integrity of the professional services which are offered to the public. However, as previously discussed, durational tests in welfare are essentially designed to accomplish the unlawful state objective of discouraging indigents from entering the state.

Secondly, durational tests in welfare have far more disastrous consequences to those whom they affect. A new arrival in the jurisdiction may be substantially inconvenienced by a law denying him the right to vote or run for office during his first year of residence. But the interest of the state in protecting the ballot may substantially outweigh that inconvenience. For a person in need of public assistance, however, far more than inconvenience is involved. At stake is life itself or the threat of family disintegration.[86] The urgent need, from both the individual

[86] In some instances, the impact of such a law may be to force a person to return to the jurisdiction which he had decided to leave. It is very unlikely that durational residence laws in other areas would have such an impact. *See* fn. 43, *supra*.

and the government's point of view, to avoid such consequences far outweighs any lawful state interest in denying aid for a year.

Thirdly, to the extent these other durational residence requirements have been upheld by the courts, they have usually been justified on the ground that they promote the same result as that sought by the related statutory provisions, *e.g.* the requirements for public office holders are likely to result in more competent and committed governmental officials. As noted earlier, however, the effect of the welfare durational residence requirement is to flaunt the primary purpose of the statutory program of which it is a part.[37] By preventing persons from receiving public assistance payments when they are in need, it promotes the very conditions which the overall assistance program is designed to alleviate.

Finally, welfare durational residence requirements are unique with respect to the extent of the national interest involved in the programs of which they are a part. Most of the requirements are found in those state public assistance programs which are substantially underwritten by federal program matching grants pursuant to the provisions of the Social Security Act. For example, in calendar 1966, of a total of $2,265,346,000 spent in AFDC programs in all the states, $1,299,940,000 or 57% came from the federal government. *Social Security Amendments of 1967, Hearings before the Committee on Finance, U.S. Senate,* 90th Cong., 1st Sess., on H.R. 12080, pt. 1, at 385. This large financial contribution is accompanied by detailed federal supervision over the various state programs. In such

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[37] *See* fn. 55, *supra.*

circumstances, the interest of an individual state in protecting welfare residence requirements is far less than it is with respect to residence requirements in areas of more traditional local concern. See *Edwards* v. *California, supra* at 174-75.[88]

It is clear, then, that public assistance durational requirements are unique in many respects, particularly concerning their purposes and the severity of their impact; thus, decisions concerning their validity will have little, if any, relevance in determining the validity of other types of durational residence laws.

[88] The court below recognized this fact when it noted that "[t]his national movement toward assistance where assistance is needed" permitted the court somewhat greater latitude in ruling that the statute in question violates the equal protection of the laws (A. 71).

Conclusion

For the foregoing reasons, it is respectfully requested that the judgment of the court below be affirmed.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. [redacted] 34

ROGER A. REYNOLDS, MAYER I. BLUM, HERBERT R. CAIN, JR., KATHERINE M. KALLICK, ROSALIE KLEIN, ALFRED J. LAUPHEIMER, EDWARD O'MALLEY, JR., NORMAN SILVERMAN, JULIA L. RUBEL, Constituting the Philadelphia County Board of Assistance, WILLIAM P. SAILER, Its Executive Director, MAX D. ROSENN, Secretary of the Department of Public Welfare of the Commonwealth of Pennsylvania, WILLIAM C. SENNETT, Attorney General of the Commonwealth of Pennsylvania,

Appellants,

—v.—

JUANITA SMITH, individually, and by her, her minor children, JOHN SMITH, TABITHA MILLER, SOPHIA PAYNTER, WILLIAM PAYNTER, VONCELL PAYNTER, and on behalf of themselves and all others similarly situated,

and

JOSE FOSTER, individually, and by her, her minor children, JEANETTE FOSTER, ANNIE BEA FOSTER, WILLIAM FOSTER, FRANCES FOSTER,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 1138

ROGER A. REYNOLDS, MAYER I. BLUM, HERBERT R. CAIN, JR., KATHERINE M. KALLICK, ROSALIE KLEIN, ALFRED J. LAUPHEIMER, EDWARD O'MALLEY, JR., NORMAN SILVERMAN, JULIA L. RUBEL, Constituting the Philadelphia County Board of Assistance, WILLIAM P. SAILER, Its Executive Director, MAX D. ROSENN, Secretary of the Department of Public Welfare of the Commonwealth of Pennsylvania, WILLIAM C. SENNETT, Attorney General of the Commonwealth of Pennsylvania,

Appellants,

—v.—

JUANITA SMITH, individually, and by her, her minor children, JOHN SMITH, TABITHA MILLER, SOPHIA PAYNTER, WILLIAM PAYNTER, VONCELL PAYNTER, and on behalf of themselves and all others similarly situated,

and

JOSE FOSTER, individually, and by her, her minor children, JEANETTE FOSTER, ANNIE BEA FOSTER, WILLIAM FOSTER, FRANCES FOSTER,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR APPELLEES

Opinion Below

The opinion of the United States District Court for the Eastern District of Pennsylvania (A. 149) is reported at 277 F. Supp. 65 (1967).

Constitutional Provisions, Statutes, and Regulations Involved

This case involves Section 1 of the Fourteenth Amendment to the Constitution of the United States, Sections 401 and 432(6) of the Pennsylvania Public Welfare Code, Act of June 24, 1937 as codified in the Act of June 13, 1967, Pa. Stat. Ann. tit. 62, secs. 401 and 432(6), and Sections 3150 *et seq.* of the Pennsylvania Public Assistance Manual. The statutes and regulation are printed in Appendix "A", *infra*, pp. 1a through 5a.

Questions Presented

1. Whether a state may consistent with the Equal Protection Clause of the Fourteenth Amendment condition public assistance to needy residents on one year's continuous residence immediately preceding application?

2. Whether public assistance residence requirements exacted by the District of Columbia and forty-six states of the Federal Union unreasonably burden the right of indigent citizens to move freely among the states and to settle where they choose?

Statement of the Case

Although appellants blandly assert that appellee Juanita Smith first came to Pennsylvania in December, 1966 (p. 6 of their Brief), the uncontradicted record evidence plainly shows that appellee lived in Pennsylvania from the time she was one month old until 1959 and had attended public schools here (A. 22, 30, 137). Her grandparents lived and

worked in Pennsylvania (A. 32); her father and mother and their brothers and sisters were all born and raised in Pennsylvania and still reside here (A. 36).

Before returning to Pennsylvania appellee with her five minor children lived in a trailer with no running water or electricity (A. 34), in a rural county in Southern Delaware (A. 30). The nearest school was a mile and a half away; the nearest source of water, three miles (A. 34). Appellee worked seasonally processing vegetables in a canning factory (A. 34). She did not pursue her desire to take a nurse's aide training course because the local hospital employed Negroes only for kitchen or maintenance work (A. 35-36).

Appellee and her children came to Pennsylvania just before Christmas, 1966 (A. 30) to rejoin her family (A. 36), to find better education (A. 35) and job opportunities (A. 35-36), and to escape the vestiges of segregation (A. 36). With financial help from her father appellee rented a house (A. 34, 36), and the eldest children entered school (A. 40). In February, when her father had been laid off (A. 36), appellees applied for public assistance (A. 36-37).

Appellees were needy and public assistance was granted (A. 36). After receiving two checks (A. 36), appellees were informed that assistance was terminated (A. 6, 16, 37). On that date, March 13, 1967, appellees were equally needy (A. 6, 16), but a reciprocal agreement between Pennsylvania and Delaware that the County Board of Assistance had thought still in force (A. 74-75) had been cancelled (A. 101-102). Assistance to appellees was terminated solely because they did not satisfy the statutory requirement of one year's residence immediately preceding their application (A. 6, 16, 137).

Private agency resources to maintain appellees were tentative and public assistance was thereafter available to appellees only to finance their return to Delaware (A. 104). The Travelers' Aid Society was the single source of financial help, public or private, available to appellees (A. 51-52). For a brief period the Society aided appellees (A. 44-45), but shortly announced that its aid must also end (A. 39-40, 45-46). Thus without public assistance, appellees could remain in Pennsylvania with no income to maintain themselves (A. 46), separate the family by placing the children in foster care (A. 47, 121-125), or return to Delaware (A. 138).

On March 31, 1967, appellees filed this action, *in forma pauperis* by leave of the Court, seeking preliminary and permanent injunction and declaratory relief on behalf of themselves and all others similarly situated (A. 3-9). The Court, on May 31, 1967, ordered that this action be maintained as a class action on behalf of all persons, citizens of the United States and residents of Pennsylvania, entitled to public assistance except that they have not resided in Pennsylvania during the immediately preceding one year (A. 135). On June 1, 1967, the Court preliminarily enjoined the enforcement of the statutory residence requirement as to appellees Juanita Smith and her minor children (A. 136-140).

On August 28, 1967, appellee Jose Foster with her four minor children returned to Pennsylvania from York County, South Carolina (A. 143). Appellee had lived in Pennsylvania from 1953 to 1965; she was married and became separated here. From 1961 to 1965 appellees Foster received public assistance here.

In the summer of 1965 appellee with her children went to South Carolina to care for her grandfather and her invalid grandmother. After residing in South Carolina for a year, appellee and two of her children qualified for and received public assistance. When her grandfather was hospitalized and her grandmother taken in by another relative, she returned to Pennsylvania to rejoin her closest family and friends and to recover for herself and her children the advantages of urban education and medical care.

Appellee moved in with her sister and brother-in-law and their children, enrolled her children in school, and for two months appellees shared their lean table and now crowded house (A. 141-144). Appellees made application for public assistance and on October 25, 1967, though appellees were in need assistance was refused solely because appellees did not satisfy the statutory requirement of one year's residence immediately preceding their application.

On November 14, 1967, appellees Foster were granted leave to intervene, *in forma pauperis,* as plaintiffs in this action, and a temporary restraining order was issued in their behalf (A. 145-148). The facts as pleaded in the Complaint were admitted and counsel stipulated, *inter alia,* that the testimony at hearing in the main action would be repeated exactly at hearing for plaintiff-intervenors.

On December 18, 1967, the Court below entered its opinion and decree declaring unconstitutional the one year residence requirement and enjoining its enforcement. On January 2, 1968, notice of appeal to this Court was filed.

Summary of Argument

It is now settled beyond question that governmental benefits created by the state and generally extended to its citizens cannot be withheld arbitrarily or for interdicted reasons. The public assistance program, federally commissioned and shared among all States of the Union, is the only public program providing cash income maintenance to the indigent, principally dependent children and the aged. By statute, government has here undertaken "to maintain and strengthen family life" (42 U.S.C. Sec. 601), and to make indigent citizens able to share in the liberties of association and settlement enjoyed by all citizens. It thus seeks to serve values which in other contexts rise to the dimension of the constitutionally protected and do not admit lightly of governmental interference.

The durational residence requirement establishes an anomalous discrimination between needy residents solely on the basis of the length of their residence. Needy residents of less than one year's duration are rejected, without regard to whether they previously lived in the state, whether they came to join relatives, to seek a better job, to take a job, or whether they had a stable residential pattern. A durational residence requirement confronts needy families, as it did appellees Smith, with the "choice of remaining in Pennsylvania with no income to maintain themselves, separating the family by placing the children in foster home care, or returning to Delaware." Limitations so inevitably affecting fundamental liberties must be carefully scrutinized.

The statute in question, though of long standing, is not a statute on which the political process has worked or can

be expected to work. The record below establishes the incompatibility of asserted justifications with demonstrated facts and the imperviousness of the legislature to factual showings. Recipients of assistance are a small group of indigents (many of them children) of fluctuating membership, lacking spare resources to invest in the political process. They are the historic victims of prejudice and intolerance, and constitute an instance of the "discrete and insular minorities" to whom Chief Justice Stone referred in his celebrated opinion in *United States* v. *Carolene Products Corp.*, 304 U.S. 144, 152 n.4. It is especially essential in such a context that hypothetical and speculative assumptions not be automatically taken as true and as valid sources of state interest. The state may impose restrictions, but its purposes and the means it chooses must be subject to careful scrutiny.

The statutory discrimination between needy residents solely on the ground of recent residence elsewhere deprives those injured thereby of the equal protection of the laws in violation of the Fourteenth Amendment. Denial of assistance here is plainly at war with the dominant purpose of assistance laws: to provide "assistance to all its needy and distressed . . . promptly and humanely with due regard for the preservation of family life." Pa. Public Welfare Code, Sec. 401. In extensive recent litigation, every conceivable purpose of durational residence restrictions has been tested; all are wanting in constitutional sufficiency.

General and Pennsylvania history alike demonstrate that the *actual* purpose of these laws is to deter the migration of indigent citizens into the state. This is patently an interdicted objective. A series of decisions establish the

illicit character of such an aim, whether "direct" or "indirect." Nor may an asserted desire to protect the public fisc bring the discrimination past constitutional muster. While economy is a valid state objective, there must be a rational, permissible basis for choosing the particular means adopted to limit expense. Absent some independent valid ground for distinction, assistance cannot be withheld from equally needy residents simply because by doing so the state may save money.

Several considerations of administrative convenience have been put forth to justify the classification. The first, a desire to establish predictability of cost for budgeting purposes, is demonstrated to be chimerical by the record in this case, by the facts of the appropriation and budget-making processes, and by the statutory encouragement to the making of reciprocal agreements with sister states setting aside the requirement of durational residence. The belated contention of appellant in this Court, that the statute serves to prevent fraudulent simultaneous collection of assistance from two or more states, has been rejected by several courts. Despite the repeated expressions of prejudices regarding the likelihood of fraudulent claims, the record plainly negates any factual predicate for such a sweeping disqualification of all claims by recent residents.

Nor may the statute be upheld as an administrative substitute for an individualized determination of actual *bona fide* residence in the State. More accurate and equally objective indicia of an applicant's intention to remain in the State indefinitely are commonly available through the detailed and individualized fact-finding incident to the uniform process of eligibility determination. Judged by established principles, the durational residence require-

ment sweeps far too broadly to rest on such remote and hypothetical administrative convenience.

A final justification, here put forth for the first time, seeks to view the one-year residence requirement as an insistence on "some investment in the community as a condition of eligibility" for assistance. This too will not withstand scrutiny. Appellees here, like forty percent of rejected applicants, had long-standing associations with the state to which they have now returned; others, benefited by reciprocal agreements, are eligible despite a total absence of prior association. The line drawn is wholly unresponsive to any supposed "investment" rationale. The fact is that public assistance is simply not an insurance program, and it is impossible to view the suggested conjecture as a substantial, not to say "compelling" state concern.

The fundamental right of all citizens to move freely from state to state and to settle where they choose, grounded on several constitutional provisions, is now established beyond doubt. The durational residence requirement is designed to deny this federal commitment by seeking to discourage the interstate migration of indigent citizens. The "invitation to retaliatory measures," *Edwards* v. *California*, 314 U.S. 160, 176, embodied in a state's adoption of residence requirements, has become a reality with the adoption of such limitations by all but four of the States of the Union. The total effect of this pattern of legislation is to restrict severely the movement of poor persons—to keep the poor where they are.

ARGUMENT

I.

Special Scrutiny of the Public Assistance Durational Residence Requirement Is Required Because It Affects Adversely Persons Subject to Prejudice and Without Recourse to the Political Processes and Because It Drastically Affects Their Fundamental Freedoms.

It is now beyond question that when the state creates benefits and extends them to its citizens, whether they be regarded as gratuities or privileges or rights, the Constitution runs with them. They cannot be withheld arbitrarily, or for interdicted reasons; they cannot be conditioned on the surrender of Constitutional protections nor can they be withheld to penalize the exercise of Constitutional freedoms. *Frost Trucking Co.* v. *R.R. Com.*, 271 U.S. 583, 594; *United States* v. *Chicago, M., St. P. & P.R.R.*, 282 U.S. 311, 328-29; *Speiser* v. *Randall*, 357 U.S. 513, 518; *Sherbert* v. *Verner*, 374 U.S. 398, 404-406.

This Term for the first time a benefit program federally commissioned and shared among all of the states and territories of the United States, second only to highways and education in money magnitude and second to none in the number of citizens it touches so directly and so intimately, is before the Court.

Public assistance is the only public program providing income maintenance to the indigent (A. 111, 121). It was established as the last vital resource when fortune imposes upon men and all other means of sustenance have

failed.[1] By far the largest number of assistance recipients are children without support; the second largest, the aged (A. 112-113). Pa. Dept. of Public Welfare, *Public Welfare Report* 75 (1966). Virtually all public assistance recipients are unemployable (A. 113-114). *Id.* at 73; Advisory Council on Public Welfare, *Having the Power, We Have the Duty, Report to the Secretary of HEW* 7-10 (1966). At one time or another, one out of every ten Americans will come to public assistance. Keith-Lucas, *Decisions About People in Need* 8 (1957). Once having faced the extremity, the length of time a recipient must continue to claim public assistance averages under two years (A. 115). HEW, *Eligibility of Families Receiving Aid to Families With Dependent Children* vi (1963).

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[1] The public assistance grant program was instituted by Congress in the Social Security Act, 42 U.S.C. secs. 301-06 (old age assistance); secs. 601-09 (aid to families with dependent children); secs. 1201-06 (aid to the blind); secs. 1351-55 (aid to the permanently and totally disabled). Public assistance is to be contrasted with the social insurance programs—old-age, survivors and disability insurance and unemployment compensation—also established by the Social Security Act, 42 U.S.C. secs. 401-25, 501-02. Public assistance was designed to provide for those who did not have the opportunity to accumulate benefits under a social insurance program. Keith-Lucas, *Decisions About People In Need* 7-8 (1957); Leydendecker, *Problems and Policy in Public Assistance* 241-45, 374-48 (1955); Miles, *Introduction to Public Welfare* 5-6, 152, 181 (1949).

All of the states, the District of Columbia, and the three extra-territorial possessions have chosen to establish public assistance grant programs (A. 91, 92). HEW, *Characteristics of State Public Assistance Plans Under the Social Security Act* 117 (Public Assistance Report No. 51, 1964 ed.).

The federal government contributes to the states up to eighty percent and a minimum of fifty percent of the cost of public assistance programs (A. 92, 94). *Id.* at 116; Advisory Council on Public Welfare, *"Having the Power, We Have the Duty", Report to the Secretary of HEW* 36 (1966).

While undoubtedly the most crucial, the money grant is not all the public assistance program provides. All public welfare programs have public assistance as a common denominator: "public assistance in a comprehensive way really underlies the whole social fabric in terms of dealing with the crises people have in life" (A. 115).[2] Social services, high school completion, job training, day care for children during training, and comprehensive out-patient medical services, for example, are available with the assistance grant (A. 108-112).

By statute government has undertaken to serve values which in other contexts rise to the dimension of the Constitutionally protected. Aid to needy families with children, for example, was created by Congress with the declared purpose to "maintain and strengthen family life," and to sustain "self-support and personal independence."[3] 42 U.S.C. Sec. 601. The public assistance chapters of Pennsylvania's Public Welfare Code, in language rehearsed substantially verbatim in all state public assistance laws, declare the same purposes: "providing public assistance to all of its needy and distressed . . . promptly and humanely with due regard for the preservation of family life . . . in such a way . . . as to encourage self-respect, self-dependency and the desire to be a good citizen and useful to society". Pa. Stat. Ann. tit. 62 sec. 401. These same values,

[2] Since public assistance is the basic support for private welfare programs, private welfare tends to assimilate the restrictions on public assistance, and itself to be unavailable where public assistance is unavailable (A. 52, 111). Steiner, *Social Insecurity: The Politics of Welfare* 8-17 (1966).

[3] "Personal independence" takes emphasis from the construction given the "money payment principle," 42 U.S.C. Sec. 606(b) as an integral part of the purpose of public assistance. HEW, Handbook of Public Assistance Administration, Pt. IV, sec. 5120.

here affirmatively pursued, do not when exercised admit lightly of interference by governments. *Meyer* v. *Nebraska*, 262 U.S. 390, 399, 401; *Pierce* v. *Society of Sisters*, 268 U.S. 510, 534-35; *Griswold* v. *Connecticut*, 381 U.S. 479. This Court has written,

> It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder . . . And it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter. *Prince* v. *Massachusetts*, 321 U.S. 158, 166 (1944).

"[T]he integrity of that life", Mr. Justice Harlan has written, "is something so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted Constitutional right." *Poe* v. *Ullman*, 367 U.S. 497, 551-52.

Just as government undertakes by public assistance to enable the exercise of freedoms in the family, it undertakes to make indigent citizens independent and able to share in the liberties protected to all other citizens—whether freely to associate with whomever they wish, *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449, 462, *Louisiana* v. *N.A.A.C.P.*, 366 U.S. 293, 296, or to settle where they see fit; *Corfield* v. *Coryell*, 6 Fed. Cas. 546 (C.C.E.D. Pa.), *Edwards* v. *California*, 314 U.S. 160, *United States* v. *Guest*, 383 U.S. 745.

Yet, the same program has certain limitations which exclude needy citizens from assistance, of which the durational residence requirement is one. To one who comes

fresh to public assistance in mid-Twentieth Century this limitation jars. The durational residence requirement establishes the following anomalies. Two families resident in Pennsylvania each in extremity and equally in need: one here fourteen months is assisted; the other here six months is not.[4] Whether they had previously lived in Pennsylvania as forty percent of the rejected applicants had, whether they came to join relatives as did sixty percent of the rejected applicants, to seek a better job as did sixty-four percent, or to take a job as did thirty-seven percent, whether they had stable residential patterns as did the half of the applicants who had lived for over five years in the state from which they came (A. 84-85), matters not. The applicants are in need but they have been resident here less than one year. If the applicants chance to have come from one of the 17 states with which Pennsylvania has a reciprocal agreement (A. 99) and to fit the assistance category in which reciprocity prevails (A. 100-101, Pl. Ex. 1), no matter the time they have been here, their previous association with the Commonwealth, or their reasons for coming, in need they will be assisted.

In a statute directed to assisting the needy, the durational residence limitation bars needy residents from assistance. As the Goodrich Committee noted when it proposed a design for public assistance in Pennsylvania: "There is . . . danger of 'pauperizing' the recipients of public aid through . . . belated help, . . . degrading their standard of living, undermining their health, destroying their hope of self-maintenance and their self-respect". Pa.

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[4] Half of the families rejected because of the residence requirement had lived in Pennsylvania more than six months before they applied for assistance; two-thirds, more than two months (A. 85).

Comm. on Public Assistance and Relief, *A Modern Public Assistance Program for Pennsylvania* 11 (1936). In a statute devoted to preserving family life, the durational residence limitation strains the solidarity of the family. Separation of the children into foster care, which exacts no residence requirement, was lightly suggested by appellants below (A. 47, 74, 121-24). The family in extremity and without income thus faces dissolution. In a statute directed to sustaining the independence of the indigent, the durational residence limitation effectively binds eight million recipients of public assistance to the state of their present residence (A. 89, 106). They can seek no new associations, they cannot return to old, nor can they choose to follow better opportunities.

The durational residence limitation confronts needy families with the "choice of remaining in Pennsylvania with no income to maintain themselves, separating the family by placing the children in foster home care, or returning to Delaware" (A. 138). See the opinion of the Court in *Harrell* v. *Tobriner,* —— F. Supp. —— (D.C.A. 64). Once public assistance is established, limitations on its availability by the exclusion of equally needy persons inevitably affects fundamental liberties and, therefore, must be carefully scrutinized.

A venerable statute, as appellant and numerous *amici* insist, is here in question. But its very long history and unchallenged existence evidence, as does the record herein, that it is not a requirement upon which the political processes have worked. As the argument *infra* indicates, justification of the requirement cannot survive the facts. Nonetheless, as the Director of the Bureau of Assistance Policies and Standards, Pennsylvania Office of Public Assistance

testified below, a legislature presented with such facts has not acted. Public opinion and sentiment about assistance to persons who have not been residents and a fear that it will greatly increase costs have precluded such legislative action (A. 96-99, 105-07).

Indeed, the public assistance residence limitation is not a statute upon which the political processes can be expected to work. Public assistance recipients have little political power. They are a small number of citizens in an affluent society; many of them are children. They are not a constant group, but a minority whose membership fluctuates. Recipients do not have resources to spare from the task of maintaining themselves, to invest in the political process. Moreover, public assistance recipients are the subjects of prejudice from the public at large and from legislators. Most persons are disposed to regard them with little toleration or concern.[5] The isolation of public assis-

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[5] The initial establishment of a public agency is a consequence of a collective political decision in which low-income people are not likely to have been . . . political actors. The framing of statutes establishing public benefits for low-income people typically reflects the attitudes of other groups which *are* effective political proponents . . . . The dominant view of the poor among the American middle class is that they are defective, morally as well as in other ways, and are likely to take advantage of public beneficence. Cloward and Piven, *The Professional Bureaucracies: Benefit Systems as Influence Systems*, in *The Role of Government in Promoting Social Change* (Proceedings of Columbia University School of Social Work Conference 1965).

See Steiner, *Social Insecurity: The Politics of Welfare*, chs. 1, 2 and 9 (1966); Lyford, *The Airtight Cage* (1966); Elman, *The Poorhouse State* (1966); Bell, *Aid to Dependent Children* (1965).

On the virtually prohibitive costs to the poor of recourse to the political processes, see Dahl, *Who Governs*, chs. 20-21 (1961) and Lane, *Political Life*, ch. 16 (1959).

On the pre-history of public assistance, evidencing similar patterns of prejudice and non-responsive law making, and its relation-

tance recipients from the political process is even more severe for those affected by a residence limitation. They are beyond the boundaries of the state and when they are within the state and confronted with the residence limitation they are necessarily in crisis to sustain life.

Even if the residence limitation did not implicate the fundamental freedoms it does, strict scrutiny of the limitation would be required since this limitation, like limitations affecting public assistance recipients generally, is surely subject to the principle given expression in Chief Justice Stone's celebrated footnote in *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152-153:

> [P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied on to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

The point here is not that public assistance as such is a fundamental right, or even as argued above that its limitation necessarily restricts the exercise of fundamental liberties. It is not that legislation affecting certain issues is subject to special scrutiny, but that as legislation affects certain persons, "discrete and insular minorities," subject to "prejudice," and hence without effective recourse to the "political processes," the legislature will be held to a higher

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ship to the shape of contemporary public assistance, seen ten Broek, *California's Dual System of Family Law: Its Origin, Development and Present Status*, 16 Stan. L. Rev. 257, 900 (1964) and 17 Stan. L. Rev. 614 (1965); Abbott, *Public Assistance: American Principles and Policies* (1940).

standard of rationality. It is not that the legislature is driven out of the area, but that its purposes and the means it chooses will be subject to more careful scrutiny.[6] Public assistance recipients are such a minority[7] and legislation affecting their interests must be carefully scrutinized. It is essential in such a context that hypothetical and speculative assumptions, often reflecting only hostility, prejudice and stereotypes, not be automatically taken as true and as valid sources of state interest.

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[6] Amsterdam, *Federal Constitutional Restrictions on the Punishment of Crimes of Status, Crimes of General Obnoxiousness, Crimes of Displeasing Police Officers and the Like*, 3 *Crim. L. Bull.* 205, 233 (1967).

[7] Public assistance recipients are no more in a position to influence the legislative process than the citizens whose interest in a national bank was protected in *McCulloch* v. *Maryland*, 4 Wheat. 316, 428. Indeed they have considerably less influence than the outsiders such as those in *McCulloch* who, though outsiders, had some economic strength they might wield inside the state. Cf. *Cooley* v. *Wardens of Port of Philadelphia*, 12 How. 299, 315; *Robbins* v. *Shelby Taxing District*, 120 U.S. 489, 499; *Wheeling Steel Corp.* v. *Glander*, 337 U.S. 562. They are much in the position ascribed to Jehovah's Witnesses in *Minersville School Dist.* v. *Gobitis*, 310 U.S. 586, 606-07 (Stone, C.J., dissenting); cf. *Barnette* v. *W. Va. St. Bd. of Educ.*, 319 U.S. 624, 628. Certainly assistance recipients have fewer "practical opportunities for exerting their political weight at the polls" than the citizen plaintiffs in *Baker* v. *Carr*, 369 U.S. 186, 258-59 (Clark, J., concurring); compare 369 U.S. at 248 (Douglas, J., concurring).

II.

The Denial of Public Assistance to Needy Residents of Pennsylvania Solely Because They Do Not Satisfy the Durational Residence Requirement Violates the Equal Protection Clause.

The durational residence requirement discriminates between (1) persons who have been residents of the state for one year or more, who may receive assistance when they become needy, and (2) persons who are residents of the state but for less than a year, who may not. Appellees and the class they represent are denied assistance because, while they are presently needy residents of the state, they have not been residents long enough, but too recently resided in another state.

In addressing classifications under the Equal Protection Clause this Court has invoked two well-established standards. As the Court said in *Gulf, Colorado, and Santa Fe Ry. Co.* v. *Ellis*, 165 U.S. 150, 155:

> [T]he attempted classification . . . must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such purpose.

McLaughlin v. *Florida*, 379 U.S. 184, 190; *Carrington* v. *Rash*, 380 U.S. 89, 93; *Loving* v. *Virginia*, 388 U.S. 1, 9. When a classification touches fundamental rights and liberties or bears against persons without effective recourse to the political processes it must meet a higher standard of

rationality. To survive close scrutiny under the Equal Protection Clause the classification "bears a heavy burden of justification," *McLaughlin* v. *Florida*, 379 U.S. 184, 196; "some overriding statutory purpose" must "clearly" appear, *id.* at 192; "remote administrative benefit to the State" will not suffice, *Carrington* v. *Rash*, 380 U.S. 89, 96. The classification "must be shown to be necessary" to the accomplishment of a permissible state objective, *Loving* v. *Virginia*, 388 U.S. 1, 11.

The purpose of the chapter of the Pennsylvania Public Welfare Code is clear. Section 401 thereof states:

> It is hereby declared to be the legislative intent to promote the welfare and happiness of all the people of the Commonwealth, by providing public assistance to all of its needy and distressed; that assistance shall be administered promptly and humanely with due regard for the preservation of family life . . . and that assistance shall be administered in such a way and manner as to encourage self-respect, self-dependency and the desire to be a good citizen and useful to society. Pa. Stat. Ann. tit. 62, sec. 401.

Appellees and their class were residents of the Commonwealth; they were in need and fully entitled to assistance but for the durational residence requirement. Their circumstances placed them well within the purpose of the statute. Presence here for less than one year did not make appellees any less "needy and distressed." Denial of assistance to them would have frustrated the declared purposes of the public assistance law by preventing "prompt" assistance to some of the Commonwealth's needy residents. This is the antithesis of "humane" and as argued *supra* it works against

"preservation of family life," "self-respect" and "self-dependency." See *Green* v. *Department of Public Welfare*, 270 F. Supp. 173, 177 (D. Del.).

Moreover, the Court below held, "The Commonwealth can ascribe no purpose at all to the distinction made by the Statute between residents who have lived in the State for over one year and residents who have not." 277 F. Supp. at 67 (A. 152). The durational residence requirement has been challenged in twenty-one courts below; every conceivable purpose therefor has been surveyed and as the following indicates has been properly found wanting.

A. *To Deter Indigent Citizens from Entering the State: The Real Purpose.*

The Attorney General does not contend, as the Court below notes, that the purpose of the residence requirement is "to erect a barrier against the movement of indigent persons into the State or to effect their prompt departure after they have gotten there and begun to realize the disadvantages of second-class citizenship." 277 F. Supp. at 67-68 (A. 154). Yet such is patently the real purpose of the residence requirement.

Length-of-residence requirements derive from Elizabeth's Poor Laws and from the Settlement Act of 1662, 14 Car. 2, whose preamble declared:

> The necessity, number and continual increase of the poor, not only within the cities of London and Westminster, but also through the whole kingdom is very great and exceedingly burdensome. [*By*] *reason of some defect in the law, poor people are not restrained*

from going from one parish to another. [Emphasis added.][8]

In 1936, a year before the enactment of Pennsylvania's residence requirement, the Pennsylvania Superior Court sustained an order directing the removal of a citizen likely to become a public charge to the poor district of the county of his "settlement." *Anderson* v. *Miller*, 120 Pa. Super. 463, 182 Atl. 742 (1936). An opinion of the Attorney General of Pennsylvania shortly after the enactment of the residence requirement construed it strictly, because "any other conclusion would tend to attract the dependents of other states to our Commonwealth." 1937-38 Official Opinions of the Attorney General, No. 240, pp. 109-110.[9] To this day the Commonwealth which denies public assistance to recent residents will pay for their return to the state from whence they came and so informs every rejected applicant (A. 104). Pennsylvania Public Assistance Manual, Sec. 3154.12.[10] And as the testimony below indicates, it is the Legislature's "fear" of an influx of poor persons to the state that sustains the residence requirement (A. 97-99).

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[8] For the lineage of residence requirements and full argument as to their real purpose, see ten Broek, *California's Dual System of Family Law; Its Origins, Development, and Present Status*, 16 Stan. L. Rev. 257, 258-91, esp. 267 (1964), and the Brief *Amicus* of the Center on Social Welfare Policy and Law herein.

[9] In Pennsylvania, opinions of the Attorney General, particularly opinions contemporary to enactments, are entitled to great weight in determining the intention of the legislature, as is the settled practice of the agency charged with the execution of the statute. Pennsylvania Statutory Construction Act, Pa. Stat. Ann. tit. 46, sec. 551.

[10] Compare Pennsylvania's hortatory and exemplary removal provisions with the "compulsory" removal provisions of other states, Mandelker, *Exclusion and Removal Legislation*, 1956 Wis. L. Rev. 57.

Such a purpose is interdicted and its pursuit plainly impermissible. The right to travel freely from state to state and to settle is inherent in the notion of a unified nation and no state may exclude citizens migrating from other states whatever the reasons for migration. *Edwards* v. *California*, 314 U.S. 160; *United States* v. *Guest*, 383 U.S. 745; *Corfield* v. *Coryell*, 6 Fed. Cas. 546 (C.C.E.D. Pa.).

The States, appellants and *amici*, attempt to distinguish the purpose of the durational residence requirements from the purpose of the asserted "direct bar on access to the State" in *Edwards*. The *Edwards* statute, however, provided: "Every person, firm or corporation, or officer or agent thereof that *brings or assists in bringing* into the State any indigent who is not a resident of the State, knowing him to be an indigent person, is guilty of a misdemeanor." 314 U.S. at 171 (emphasis added). The Attorney General of California made it eminently clear that the statute as such did not bar indigents from entering the state. "It does not in terms exclude any indigent person, nor does it in effect exclude any indigent family." Brief of the Attorney General of California, p. 47; and see pp. 3, 4-8, 27, 29-30, 32. Appellant in *Edwards* did not argue that the statute directly barred migration into the state; rather it deterred or impeded or hampered. Brief of Appellant, pp. 15, 16, 21. The indigent Duncan from whose perspective *Edwards* was decided was, of course, in California; he was no more excluded, or even deterred, by the California statute than were appellees by the durational residence requirement. The *Edwards* statute was unconstitutional not because it directly barred entry but because its purpose was patently clear. 314 U.S. at 174.

Since the purpose of the durational residence requirement is to deter indigents from entering the state, the statute falls before the Equal Protection Clause for that purpose is Constitutionally interdicted.[11]

B. *To Protect the State's Fisc.*

What concerns appellant and *amicus* states is their misimpression that, as the Brief of California, p. 2 puts it, the Courts below have concluded "that a statute which has for its purpose protection of the state's fiscal responsibility is per se . . . unconstitutional." No court below so held. To be sure, protecting the state's purse *by excluding indigent newcomers* was held unconstitutional *per se*. *Smith* v. *Reynolds*, 277 F. Supp. at 68 (A. 154); *Harrell* v. *Tobriner*, —— F. Supp. —— (D.C. A. 71) (Bazelon, C.J., concurring); *Thompson* v. *Shapiro*, 270 F. Supp. at 336-37 (Conn. A. 26-27); *Green* v. *Department of Public Welfare*, 270 F. Supp. 173 (D. Del.). Saving money is, of course, not impermissible; but saving money alone is not, nor has it ever been, sufficient reason to sustain a statute in face of an equal protection challenge.

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[11] If the purpose were permissible, the uncontradicted record evidence is that citizens do not migrate to secure public assistance (A. 84-85). Nor does the elimination of residence requirements result in any great influx of indigent newcomers (A. 94-95, 98). See the opinion below, 277 F. Supp. at 66, 68 (A. 150-51, 154). The residence requirement thus rests arbitrarily on disproved factual assumptions. The facts are more extensively set out in the Brief *Amicus* of the Center on Social Welfare Law and Policy herein and in the Brief of Appellees in *Washington* v. *Harrell*, No. 1134. See Roland J. E. Artigues, *A Study of Residence Requirements and Reciprocal Agreements in the Public Assistance Program in Pennsylvania* (unpub. doc. diss. U. of Pa. Sch. of Soc. Work 1959). The failure of the Legislature to recognize fact and its presistent unfounded fear is further testimony to the impervious character of prior conceptions about assistance recipients and the poor and the closed state of the political processes as to them.

As the court below correctly held,

> [T]he constitutional test of equal protection is not satisfied by considerations of minimal financial expediency alone . . . . There must be some otherwise legitimate purpose for excluding members of the class who are in fact deprived of the protection and privileges of existing laws. It is not enough to say that the class is excluded because money is saved. 277 F. Supp. at 68 (A. 155).

Certainly a state may classify to save money. The only Constitutional point is that the line drawn must rest on some independent rational ground. Allocation of resources no less than other substantive legislative action is governed by the Equal Protection Clause. See, *e.g.*, *Griffin* v. *School Board*, 377 U.S. 218. If appellants were right in their contention (Addendum A to Appellants' Brief, p. 30) that allocation of limited resources as such or their conservation is sufficient purpose to justify the classification here, *any* classification would be justifiable. The classification in *Brown* v. *Board of Education*, 349 U.S. 294 (compare *Aaron* v. *Cooper*, 358 U.S. 1, 13), for example, or in *Rinaldi* v. *Yeager*, 384 U.S. 305 would have been impeccable.[12]

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[12] The injuries visited upon public assistance recipients in the name of the conservation of resources are infamous. See, *e.g.*, *Welfare—To Save Money or People?*, N.Y. Times, May 14, 1967, Pt. IV, p. 5, cols. 1-4. See *Collins* v. *State Board of Social Welfare*, 248 Iowa 369, 81 N.W.2d 4 (1957) (holding maximum family grants a violation of equal protection). *Cf. Parrish* v. *Civil Service Comm'n.*, 66 Cal. 2d 260, 425 P. 2d 223, 27 Cal. Reptr. 623 (1967) (holding public assistance recipients protected from unreasonable search and seizure designed solely to reduce the rolls of the eligible recipients).

The basis of classification proffered here would allow the state to withhold public assistance from, *e.g.*, all redheads, or from every fiftieth applicant or from every person who applies on the second Friday of the month. Such classifications would undoubtedly protect the state's fisc, but they rest on distinctions without difference. They would fall as arbitrary. The very point of the cases from *Frost Trucking Co.* v. *R.R. Com.*, 271 U.S. 583 to *Sherbert* v. *Verner*, 374 U.S. 407 is that the state once having resolved to extend benefits cannot arbitrarily withhold them. Absent some independent, permissible ground for distinction, public assistance cannot be withheld from equally needy residents simply because by doing so the state may save some money.

C. *To Serve Predictive Purposes in Budgeting for Public Assistance.*

Appellants urge certain administrative considerations to justify the classification among residents. The first, budget predictability, was found in the dissenting opinion below to comprise the "state of facts [which] reasonably may be conceived to justify" the discrimination (A. 163).[18]

At the hearing in this case in uncontradicted testimony embraced by appellants' counsel (A. 129, 150), the Director of the Bureau of Assistance Policies and Standards of the Pennsylvania Office of Public Assistance stated that the elimination of the residence requirement would not complicate the budgetary process (A. 95). The Director testified that the cost of providing assistance to recent residents who are needy would be $1,637,500 in the first year, as compared with a total public assistance budget of $336,-

[18] See the same Judge's opinion for the Court in *Waggoner* v. *Rosenn*, —— F. Supp. —— (M.D. Pa. 1968).

557,000 (A. 94-95). This estimate is grounded, *inter alia*, in the experience of states which have no residence requirement (A. 94-95, 98-99) and in the constant number of rejected applicants over recent years (A. 83). The Department's predictions on the cost of other policy changes have proved exceptionally accurate (A. 95). Indeed, the Director testified, the administration of the residence requirement imposes considerable burdens (A. 96, 99-103, 104). As the Court below found, "[a]dministrative costs and budgetary problems would actually be significantly decreased if the residence requirement were abolished." 277 F. Supp. at 66 (A. 152). "[A]ll of the evidence is to [this] effect." 277 F. Supp. at 68 (A. 154).[14]

Not only is the postulated purpose of budget predictability betrayed by the record in this case, but it is not even a reasonably "conceivable" justification for the one-year residence requirement.[15] For twenty-two years, from

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[14] The evidence and the findings of the Court were to the same effect in *Thompson* v. *Shapiro*, 270 F. Supp. at 338 (Conn. A. 28). See also *Harrell* v. *Tobriner*, —— F. Supp. at —— (D.C. A. 68).

[15] Other conceptions of the budget process assertedly germane to predictability and urged in the dissent, 277 F. Supp. at 71-72 (A. 163-165), are similarly erroneous. Cost of living increases in Pennsylvania public assistance grants, *e.g.*, are not automatic (A. 164), nor indeed do they occur with any regularity. Pa. Dept. of Public Welfare, *Public Assistance Allowances Compared with the Cost of Living at a Minimum Standard of Health and Decency* (1967). The number of aged persons receiving public assistance in Pennsylvania is not increasing (A. 164), but has decreased from 101,557 recipients in 1942 to 44,973 in 1966 and has been decreasing steadily each year, as the record shows (A. 113). Pa. Dept. of Public Welfare, Public Welfare Report, 65 (1966). The $22,600,000 increase in medical assistance expenditures in 1967-1968 (A. 164) was caused by the establishment of an entirely new program under Title XIX of the Social Security Act. The new Medical Assistance program, Pa. Stat. Ann. tit. 62, sec. 443 (Supp. 1967), was created by the legislature with no fully relevant prior experience and has been financed without any necessity to borrow against the Commonwealth's debt limit.

1937 when public assistance was established until 1959, the legislature of the Commonwealth met in fiscal session only biannually and the budget was a two year budget. Administrative Code, Act of April 9, 1929, as amended, Pa. Stat. Ann. tit. 71, sec. 221. The Commonwealth has reciprocal agreements with seventeen states granting assistance to residents of those states who may come to Pennsylvania (A. 99-103). Pursuant to Section 432 (6)(ii) of the Public Welfare Code, these agreements are sought by the Commonwealth without regard to season and clearly without concern about predictability (A. 100-101). Predictability is no more a question with respect to needy residents who have been here less than a year than it is with respect to needy residents here more than a year.[16] If the state has a serious interest in predictability, then a one-year waiting period for every applicant would seem Constitutionally required. See *Ramos* v. *Health and Social Services Board,* —— F. Supp. —— (E.D.Wis. 1967) (Slip Opinion pp. 9-10); *Thompson* v. *Shapiro,* 270 F. Supp. at 338 (Conn. A. 28).

Budget predictability, therefore, falls even as a conceivable purpose to justify the durational residence requirement. Before the more careful scrutiny required of this classification, it must certainly fall. Budget predictability presents at best a "remote administrative benefit" to the state and, hence, is insufficient to justify the classification.

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[16] The postulation of predictability commits the fallacy of assuming that recent residents who apply for assistance will still be needy one year hence (contrast A. 115) and still in the state (contrast A. 45-46, 104, 138). The vast majority of applicants for assistance next year undoubtedly are residents who will not have been needy until that time (A. 95, 115) and who therefore will not apply until then. The likelihood of recent residents being needy in the future is no greater nor any less than long-time residents.

Oyama v. *California*, 332 U.S. 633, 646-47; *Carrington* v. *Rash*, 380 U.S. 89, 96; *Harman* v. *Forssenius*, 380 U.S. 528, 542-43; *Rinaldi* v. *Yeager*, 384 U.S. 305, 310.

D. *To Prevent Fraud.*

For the first time in this case appellants in this Court urge that the residence requirement be sustained as a reasonable administrative device for the prevention of fraud. Appellants' Brief, p. 15.

Three Courts have held the durational residence requirement an insufficiently rational means to attain this postulated purpose. *Green* v. *Department of Public Welfare*, 270 F. Supp. at 177; *Thompson* v. *Shapiro*, 270 F. Supp. at 338 (Conn. A. 28); *Harrell* v. *Tobriner*, —— F. Supp. at —— (D.C. A. 68-69). As these Courts found there are common means to prevent fraud which do not so broadly disqualify needy citizens. Such a broad proscription is not deemed necessary when applicants have come from a state with which Pennsylvania has a reciprocal agreement.[17] Normal verification procedures then suffice.

Fear of fraud and the charge of its likelihood constantly prejudices public assistance recipients.[18] Nothing in the record here, or elsewhere, warrants such a fear. See *Sherbert* v. *Verner*, 374 U.S. 398, 407. The straightforward fact is that the rate of client error of any sort in eligibility determinations in Pennsylvania is only 2.8 percent and, of this, one-percent is not wilful; the national rate is com-

[17] See also *Fox* v. *Michigan Employment Security Comm'n.*, 379 Mich. 579, 153 N.W. 2d 644 (1967) striking down a classification in unemployment compensation which the state defended as preventing duplicate payments and fraud.

[18] See *Parrish* v. *Civil Service Comm'n.*, 66 Cal. 2d 260, 57 Cal. Rptr. 623 (1967).

parable. HEW, *Eligibility of Families Receiving Aid to Families with Dependent Children* (Report Requested by the Senate Appropriations Committee) ii, viii, 16 (1963).

The durational residence requirement has not been shown necessary to the suggested purpose. *Loving* v. *Virginia*, 388 U.S. 1, 11. At best, the state has a "remote" and insufficient administrative benefit. *Oyama* v. *California*, 322 U.S. at 646-47.

E. *To Test Residence.*

No question is raised here regarding the power of the Commonwealth to limit public assistance to residents of Pennsylvania. It was common ground below that appellees were residents of Pennsylvania (A. 3, 16, 137, 150).[19]

While not raised in this case, it has been suggested that the durational residence requirement is a proper objective test of residence. The Delaware Court has addressed the suggestion.

> [T]he one year period is a constitutionally unreasonable test for determining the 'intention' aspect of domicile, assuming such was its purpose. More accurate alternatives are available to ascertain an individual's true intentions without exacting the protracted waiting period with its dire economic and social consequences to certain individuals living in the state. 270 F. Supp. at 177-78.

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[19] The Federal Handbook of Public Assistance Administration, Pt. IV, sec. 3620 defines residence as follows: "[A person] shall be considered to have his residence at the place where he is living if he is living there voluntarily and not for a temporary purpose, that is, with no intention of presently removing therefrom."

The Pa. Public Assistance Manual, sec. 3151.11 provides: "A person has residence in Pennsylvania for assistance purposes if he makes his home here."

More accurate and equally objective indicia of the present intent of an applicant to remain in the state indefinitely are easily and commonly available through the fact-finding process of eligibility determination. Such indicia as the following are characteristically conclusive in Pennsylvania courts: whether the family is together and where it abides, where the children are enrolled in school, where close relatives live, and where personal effects are located, where a car is registered and a driver licensed. *In re Stabile,* 348 Pa. 587, 36 Atl. 2d 451 (1944); *In re Publicker's Estate,* 385 Pa. 403, 123 Atl. 2d 655, 661-62 (1956); *Anderson* v. *Miller,* 120 Pa. Super. 463, 182 A. 742 (1936). Such facts must be presented to the caseworker by all applicants for assistance, recent residents or not, to prove eligibility. Pa. Public Assistance Manual, Sec. 3100 et seq.; Pa. Dept. of Public Welfare, *"What to Bring With You,"* DPA Form 11 (1959). By the same token, they are sufficient to establish *bona fide* residence.

The durational residence requirement is not reasonably directed to the postulated purpose and it sweeps too broadly. As with the postulated purposes considered *supra,* "remote administrative benefit" to the state will not sustain the classification. See especially, *Harman* v. *Forssenius,* 380 U.S. at 543; *Carrington* v. *Rash,* 380 U.S. at 98.

F. *To Secure Investment in the Community as a Condition of Eligibility.*

Appellants, again for the first time on appeal, postulate a "legislature insisting on some investment in the community as a condition of eligibility" for assistance. Appellants' Brief, p. 14.

Such a purpose is not finely served by the durational residence requirement. The requirement is both too broad and too narrow reasonably to measure or to exact investment. Appellees (A. 22, 30), like forty percent of the rejected applicants (A. 85), had lengthy prior residence in the community to which they had now returned. Like sixty percent of the rejected applicants (A. 85), appellees had relatives in this community. Others who come to Pennsylvania and are assisted under the reciprocal agreements, may have had no such prior association. The rejected applicants are residents; they pay sales taxes and, through their landlord, property taxes, even as recipients themselves do. Fully half of those rejected because of the residence requirement have been here six months (A. 85). A resident needy in April and denied assistance until December is hardly likely to have made any larger investment come December.[20]

On this record and in the face of these discrepancies it is difficult even to conceive that the imposition of the residence requirement has such a purpose. Certainly the exaction of a prior investment in the state before need will be met does not appear a "compelling" interest of the state. The contribution of any resident to the Commonwealth in less than a year is so conjectural, and the contribution at the close of a year so marginally different, that the very great injury imposed on needy residents by

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[20] Contrary to appellants' suggestion at p. 14 that one must have for a year "channell[ed] privately originated finances into the Community's streams of commerce" to qualify for assistance, nothing in the statute or in the regulations so suggests or requires. See Pa. Public Assistance Manual, secs. 3150 *et seq.* Contrast *Harrell* v. *Tobriner*, —— F. Supp. at —— (D.C.A. 70, n. 19) (an applicant resident in the District for over a year but in a public institution).

the denial of assistance must on any careful scrutiny outweigh any possible interest of the state.

Moreover, public assistance is simply not an insurance program.[21] In its own terms public assistance is designed to assist the needy and *thereby* "to promote the welfare and happiness of all the people of the Commonwealth." Public Welfare Code, Pa. Stat. Ann. tit. 62 sec. 401. The unassisted needy resident's plight harms the people of the state, whatever his prior investment. The declared interest of the state is served only by granting assistance to needy residents when they are needy.

III.

Durational Residence Requirements Unreasonably Burden the Right Freely to Move From State to State and to Settle, Affronting the Premises of the Federal System.

It is now settled that since we are one Nation under the Constitution all citizens have a fundamental right freely to move from state to state. *United States* v. *Guest*, 383 U.S. 745. Definition of this right began with the opinion of Mr. Justice Washington on circuit in *Corfield* v. *Coryell*, 6 Fed. Cas. 546, 551-52 (C.C.E.D. Pa. 1823).[22] The court there confined the privileges and immunities of citizens of the several states to those which are "in their nature, funda-

[21] For the place of public assistance in the scheme of the Social Security Act, see n. 1 *supra*.

[22] In one part, 6 Fed. Cas. at 553-55, this case drew the very boundary between Pennsylvania and Delaware beyond which the Commonwealth here sought to restrict appellee Smith and her children.

mental; which belong, of right, to the citizens of all free governments." First among them, "[t]he right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise."

In *United States* v. *Guest*, 383 U.S. 745, 757, this Court unanimously held: "The constitutional right to travel from one State to another . . . occupies a position fundamental to the concept of our Federal Union." As earlier in *Crandall* v. *Nevada*, 6 Wall. 35, 48-49, the Court took as its guide the statement of Chief Justice Taney in the *Passenger Cases*, 7 How. 283, 492:

> For all the great purposes for which the Federal government was formed, we are one people, with one common country. We are all citizens of the United States; and, as members of the same community, [we] must have the right to pass and repass through every part of it without interruption, as freely as in our own States.

The right freely to move and to settle derives from several clauses of the Constitution, each a touchstone of federalism.

The right is protected as a privilege and immunity of national citizenship. Rooted in *Corfield* v. *Coryell*, *supra*, it received its fullest statement in the concurring opinions in *Edwards* v. *California*, 314 U.S. 160, 177, 181, adopted by the Court in *United States* v. *Guest*, 383 U.S. at 758. *Edwards* held protected not the mere right to cross state lines or simply a momentary sojourn but the right to settle. As Justice Jackson stated, "[I]t is a privilege of citizenship of the United States . . . to enter any state . . . for the establishment of permanent residence therein." 314 U.S. at 183. Justice Douglas found the *Edwards* statute

infirm because it "would prevent a citizen . . . from seeking new horizons in other States." 314 U.S. at 181. Justice Byrnes found it necessary in the prevailing opinion to consider, and disallow, the asserted purpose of the statute, to meet "problems of health, morals, and especially finance, the proportions of which are staggering," 314 U.S. at 173, a purpose germane not to a mere right to cross borders but to a right to stay.

The right to move and to settle is a liberty protected by the Due Process Clauses. Indeed it is a liberty "closely related to the rights of free speech and association." *Aptheker* v. *Secretary of State,* 378 U.S. 500, 517; *Kent* v. *Dulles,* 357 U.S. 116, 125-26. Finding that the movement cases adopt the analysis of liberty set out by Chafee, Mr. Justice Harlan concurring in part in *United States* v. *Guest,* 383 U.S. 745, 769-70, wrote:

> 'Already in several decisions the Court has used the Due Process Clause to safeguard the right of the members of any race to reside where they please inside a state, regardless of ordinances and injunctions. Why is not this clause equally available to assure the right to live in any state one desires? And unreasonable restraints by the national government on mobility can be upset by the Due Process Clause in the Fifth Amendment . . . Thus the "liberty" of all human beings which cannot be taken away without due process of law includes liberty of speech, press, assembly, religion and also liberty of movement.' 383 U.S. at 770, quoting Chafee, *Three Human Rights in the Constitution of 1787* 192-93 (1956).

The primary purpose of the Privileges and Immunities Clause of Art. IV, Sec. 2, is to "fuse into one nation a

collection of independent, sovereign states." *Toomer* v. *Witsell*, 334 U.S. 385, 395. Not only does this clause bar discrimination against citizens of other states "where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other states," *id.* at 396, but it prohibits legislation affecting citizens of the respective states as will "substantially or practically put a citizen of one state in a condition of alienage when he is within or removes to another state." *Blake* v. *McClung*, 172 U.S. 239, 256. A discrimination "so great that its practical effect is virtually exclusionary" will not be countenanced. *Toomer* v. *Witsell*, 334 U.S. at 397.[23]

The durational residence requirement denies this federal commitment. The purpose of the residence requirement, its very design, is to discourage indigent citizens from migrating. See Argument *supra* at Sec. II.C. In *Edwards* v. *California*, 314 U.S. 160, this Court struck down a statute which had the same purpose and which no more than the statute here (see pp. 23-24 *supra*) impeded the freedom to move and to settle. In *Edwards* the Court was particularly concerned with the aggregation of restrictions on that freedom. Justice Byrnes wrote, "The prohibition against trans-

[23] Relying on *New York* v. *O'Neill*, 359 U.S. 1, 6, the Connecticut Court regarded Art. IV, Sec. 2 as inapplicable to the plaintiff there who was a citizen of the state. *Thompson* v. *Shapiro*, 270 F. Supp. at 334 (Conn. A. 21). But here as in *Toomer* v. *Witsell*, *supra*, the discrimination runs to non-citizens as well.

The essential constitutional assertion of one nation rests also on the State Citizenship Clause of the Fourteenth Amendment and on the Equal Protection Clause itself as well. As Mr. Justice Brennan has written, "[T]he Equal Protection Clause, among its other roles, operates to maintain this principle of federalism." *Allied Stores of Ohio* v. *Bowers*, 358 U.S. 522, 532-33 (concurring for himself and Harlan, J.). See also *Truax* v. *Raich*, 239 U.S. 33, 41-43.

porting indigent non-residents into one state is an open invitation to retaliatory measures, and the burdens upon the transportation of such persons become cumulative." 314 U.S. at 176. That invitation to retaliation is a reality here (A. 106-107, Pl. Ex. No. 3). Forty-six of the fifty states and the District of Columbia exact a durational residence requirement for public assistance (A. 91-93). The effect of Pennsylvania's requirement does not end with its discriminatory impact upon needy persons presently residing in Pennsylvania. With similar length-of-residence requirements in forty-six states and the District of Columbia, its effect is severely to restrict the freedom of movement of numerous poor persons. While some of the eight million citizens receiving public assistance might be willing to forfeit assistance for a substantial period in exchange for the opportunities which a new place of residence might offer, the collective impact of durational residence requirements is, bluntly, to make the poor stay put.

Virtually none of the eight million public assistance recipients, aged, blind, disabled, children and those who must care for them, are employable (A. 112-114). Pa. Dept. of Public Welfare, *Public Welfare Report* 73 (1966); Advisory Council on Public Welfare, *"Having the Power, We Have the Duty", Report to the Secretary of HEW* 7-10 (1966). For recipients, public assistance is the last resource; income maintenance to the indigent is available from no other public program (A. 111, 121), nor from any private program (A. 52, 111). It is not surprising therefore that durational residence requirements reduce recipients to immobility. The Director of the Bureau of Assistance Policies and Standards of the Pennsylvania Office of Public Assistance was prepared to testify below that citizens who

were receiving assistance in Pennsylvania but who wished to move to another state could and did not because of that state's residence requirement (A. 89, 106). The Court indicated that such facts were so clear as to require no proof (A. 89, 94).[24]

The United States is a federation characterized by mobility. This mobility serves the strength of the nation and the wishes of individual citizens to share in that strength. Each year nearly seven million people move from state to state. "[To] divide our citizenry . . . into one class free to move from state to state and another class that is poverty-bound to the place where it has suffered misfortune is . . . at war with the habit and custom by which our country has expanded. . . . " *Edwards* v. *California,* 314 U.S. at 185 (Jackson, J. concurring). As Justice Douglas there said,

> [T]o allow . . . an exception to be engrafted on the rights of national citizenship would be to contravene every conception of national unity. . . . It would permit those who were . . . indigents . . . to be relegated to an inferior class of citizenship. It would prevent a citizen because he was poor from seeking new horizons in other states. It might thus withhold from large segments of our people that mobility which is basic to any guarantee of freedom of opportunity." 314 U.S. at 181.

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[24] See *Bull* v. *Board of Directors of the South Carolina Board of Public Welfare,* C.A. No. 68-308 (E.D. S.C. filed Apr. 22, 1968) (an action seeking an injunction against South Carolina's residence requirement brought by a husband and wife, presently residents of Pennsylvania, both now receiving Aid to the Blind here, who for medical reasons have been advised to settle in a warmer climate and who wish to return to the county of the husband's birth and early adulthood).

As the cases discussed herein hold, the state must have a most substantial interest so to burden the right to move and to settle. As argued above at Sec. II, it has none.

Conclusion

The Court should hold that the durational residence requirement deprives appellees and the class they represent of the equal protection of the laws and constitutes an unreasonable burden on the right freely to move and to settle. The decision below should be affirmed.

Respectfully submitted,

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APPENDIX "A"

PA. STAT. ANN., TIT. 62, SEC. 432 (SUPP. 1967)

It is hereby declared to be the legislative intent to promote the welfare and happiness of all the people of the Commonwealth, by providing public assistance to all of its needy and distressed; that assistance shall be administered promptly and humanely with due regard for the preservation of family life, and without discrimination on account of race, religion or political affiliation; and that assistance shall be administered in such a way and manner as to encourage self respect, self dependency and the desire to be a good citizen and useful to society.

PA. STAT. ANN., TIT. 62, SEC. 432(6) (SUPP. 1967)

Assistance may be granted only to or in behalf of a person residing in Pennsylvania (i) who has resided therein for at least one year immediately preceding the date of application; (ii) last resided in a state which, by law, regulation or reciprocal agreement with Pennsylvania, grants public assistance to or in behalf of a person who has resided in such state for less than one year.

PA. PUBLIC ASSISTANCE MANUAL, SECS. 3150 *et seq.*

The following regulations on residence are based on the Public Assistance Law, Act of June 24, 1937, P.L. 2017; the Uniform Transfer of Dependents Act, Act of April 29, 1941, P.L. 30; and the interpretations of those laws by the Department of Justice.

3150 PENNSYLVANIA RESIDENCE

3150.1 *Definitions*

3150.11 *Pennsylvania Residence*

A person has residence in Pennsylvania for assistance purposes if he makes his home here, or if he regards Penn-

APPENDIX "A"

PA. STAT. ANN. TIT. 62, SEC. 401 (SUPP. 1967)

It is hereby declared to be the legislative intent to promote the welfare and happiness of all the people of the Commonwealth, by providing public assistance to all of its needy and distressed; that assistance shall be administered promptly and humanely with due regard for the preservation of family life, and without discrimination on account of race, religion or political affiliation; and that assistance shall be administered in such a way and manner as to encourage self-respect, self-dependency and the desire to be a good citizen and useful to society.

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Assistance may be granted only to or in behalf of a person residing in Pennsylvania who (i) has resided therein for at least one year immediately preceding the date of application; (ii) last resided in a state which, by law, regulation or reciprocal agreement with Pennsylvania, grants public assistance to or in behalf of a person who has resided in such state for less than one year . . . .

PA. PUBLIC ASSISTANCE MANUAL, SECS. 3150 *et seq.*

The following regulations on residence are based on the Public Assistance Law, Act of June 24, 1937, P.L. 2051; the Uniform Transfer of Dependents Act, Act of April 23, 1941, P.L. 20; and the interpretations of these laws by the Department of Justice.

3151 PENNSYLVANIA RESIDENCE

3151.1 *Definitions*

3151.11 *Pennsylvania Residence*

A person has residence in Pennsylvania for assistance purposes if he makes his home here, or if he regards Penn-

sylvania as his home during his temporary absence from Pennsylvania. . . .

3151.2 *Residence Requirements for Assistance Purposes*

3151.21 *Applicant*

An applicant meets the residence requirements for assistance if he is *residing in Pennsylvania at the time of application*, and if one of the following circumstances exists:

a. The person has resided in Pennsylvania for one year immediately before the application. Temporary absence does not interrupt residence in Pennsylvania.

b. The person has not resided in Pennsylvania for one year immediately before application, but the person:

(1) Was last a resident of a state that by law, regulation or reciprocal agreement with Pennsylvania, grants assistance without regard to the period of residence (3150 Appendix I gives the pertinent information); . . .

3153 Requests From Out-of-State Agencies

The County Office has the authority and responsibility to determine whether a person has Pennsylvania residence for assistance purposes and to provide the information to an out-of-state agency when requested. . . .

3154 Temporary Assistance to Non-Residents

The Public Assistance Law provides for the granting of assistance to a needy homeless or transient without nullifying the legislative requirement on residence. As used in 3154, a homeless or transient means any person who does not have residence in Pennsylvania for assistance purposes.

A homeless or transient person is eligible for assistance only as set forth below.

Assistance includes medical care under the conditions in 3911.3 and payment for burial under the conditions in 3723.3.

3154.1 *Resident of Another State*

3154.11 *Has Plans for Self-Support*

A person, who has a plan for self-support that appears real and immediate, is eligible for one one-time grant while the facts are being verified.

If the facts confirm the plan and the source of self-support makes it necessary for the person to move outside the County, the person is eligible for only one grant and only for the purpose of reaching his destination.

If the facts confirm employment and the person does not have to move outside the county to accept the employment, the person is eligible for one one-time grant pending employment, and if employed within one week, such other one-time grants as may be necessary until he receives his initial pay.

If the facts do not confirm the plans, the person may be eligible for further assistance as a homeless or transient person only if he decides to return to the state where he has residence.

3154.12 *Has No Plan for Self-Support*

If the person wants to return to the state he ~~claims~~ to be his home state, he is eligible for no more than four one-time grant(s) while his residence or settlement for assistance purposes in that state is being verified. The County Office requests the appropriate agency in the other state to make this determination. In addition to the information on residence, the County Office asks for other information that may be helpful to the person in making and carrying out his plan to return. The County Office does not request "authorization to return."

The request to the other state should include the following information about the person:

a. Address(es) while in that state.

b. Place(s) of employment.

c. Names and addresses of people in that state who know him.

d. Approximate date he last left the state.

If the other state confirms the person's residence claim and he still wants to go there, he is eligible for a grant for the purpose of reaching his destination.

If the person decides not to go to the other state, or if the other state does not reply before the last day covered by the fourth one-time grant, or if the other state makes a finding that the person does not have residence or settlement in that state for assistance purposes, he is ineligible for further assistance as a homeless or transient person unless 3154.11 or 3154.2 applies.

3154.2 *Stateless Person*

As used in 3154, a stateless person is one who has not established residence in any state for assistance purposes.

A person who claims he is stateless and whose claim is apparently justified by the facts, or a person who has been found to be stateless, is eligible for assistance as a homeless or transient person only if the regulations in 3154.11 apply.

3154.3 *Computing the Grant*

3154.31 *Grant While Facts are Being Verified*

Each grant is for seven days or less, as needed.

The amount of the one-time grant(s) for each person is the prorated amount of the county's maximum monthly allowance per person for room and meals in restaurants (3253.3).

3154.32 *Grant to Reach Destination*

The grant to reach destination includes the actual minimum cost of all of the following items that the person needs:

a. Transportation to his destination by the most economical means of travel.

b. Food en route and for one day after arrival, at the rate of $2.00 a day per person.

c. Lodging en route, if necessary.

3154.4 *Report on Transients*

Occasionally a homeless or transient person or family seems to be traveling about from place to place primarily to try to get assistance that is available to transients; and only incidentally for such other reasons as looking for work or getting back home or to friends or relatives where help may be available. If, in the judgment of the County Office, a homeless or transient person or family applying for assistance appears to be a "deliberate repeater," the County Office reports promptly to State Office on such persons. The report gives appropriate information under such headings as: date of contact; name(s) of transient(s); age(s) or birthdate(s); descriptions; address(es); social security number(s); occupation(s); veteran's status; relatives; clearance with other agencies; story including attitude or behavior during contact; disposition of application; basis for thinking transient is "deliberate repeater." The original of the report is sent to the Director, Bureau of Assistance Services, no later than the day after the person or family applied. If State Office has reports indicating that a transient has applied for assistance more than once and may be a "deliberate repeater," all County Offices will be promptly notified.

3150 APPENDIX

Residence and Temporary Assistance to Non-Residents

(See opposite) ☞

RECIPROCAL STATES

Appendix I provides the following information:

a. States that by law, regulation, or reciprocal agreement with Pennsylvania grant assistance without regard to the period of residence.
b. The types of assistance covered.
c. Other known factors in the reciprocal states' regulations which affect a person's eligibility; this information should be helpful in planning with persons who intend to move out of the state.

Codes

I - Reciprocity Conditioned by Intent - The State grants assistance to a person from Pennsylvania without regard to length of residence, if the person intends to establish residence in the State.

I# - Same as I, but the granting of assistance depends upon the availability of limited funds.

I## - Same as I, except that Pennsylvania recipients only are covered.

A - Reciprocity Conditioned by the Right to Authorize Return - The State grants assistance to a person from Pennsylvania without regard to length of residence, but reserves the right if the person has not lived in the State one year and if it is to the person's best interest, to authorize the person's return to the State where he has residence.

Reciprocal States	OAA	ADC	GA	BP-AB	AD
Alaska		I			
Arkansas			I#		
Connecticut	I	I		I	I
Delaware				I	
Georgia		I			
Hawaii	A	A	I	A	I
Idaho	I	I		I	I
Maine	I##	I##		I## BP-M only 2/	I##
Michigan	I##			I##	
Minnesota		I			
Mississippi				I	
New Hampshire	I##	I##		I## BP-M only 2/	I##

Rev.*

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Rev.**

Reciprocal States	OAA	ADC	GA	BP-AB	AD
Alaska		I			
Arkansas			I#		
Connecticut	I	I		I	I
Delaware				I	
Georgia		I			
Hawaii	A	A	I	A	I
Idaho	I	I		I	I
Maine	I##	I##		I## BP-M only 2/	I##
Michigan	I##			I##	
Minnesota		I			
Mississippi				I	
New Hampshire	I##	I##		I## BP-M only 2/	I##
New Jersey		I 3/		I BP-M only 2/	
New York	I 1a/ 1b/	I 1b/ 1c/	I 1b/ 1c/	I 1b/	I 1b/ I
Rhode Island	I	I		I	I
South Carolina			I		I
Virgin Islands	I	I	I	I	I
Wisconsin	I			I	

1a/ A person may receive OAA in a nursing home in New York, only if all necessary arrangements have been made through the local (N.Y.) commissioner of public welfare before the individual is admitted to the home, or before any contract is made with the home for his care.

1b/ A person who has come into New York solely for the purpose of qualifying for public assistance is not eligible for any category of assistance. If he entered the state 6 months or more before the date of application, he is considered to have entered for a purpose other than to receive public assistance.

1c/ A person who has come into New York State is not eligible for Home Relief or ADC if he is "undeserving of and ineligible for assistance"-i.e., if he is found capable of working but either is not employed or has not submitted a certificate from the appropriate local employment office that there is no job opening for him. If found to be "undeserving and ineligible," the applicant may be provided by New York with transportation to return to another state or another county, or temporary assistance in New York until "other plans eliminating need in this State" are in effect.

2/ Reciprocity on residence for persons applies only to eligibility for BP-M. Such persons will be eligible for BP-B only after meeting the regular residence requirements.

3/ New Jersey continues ADC up to 2 months following the month in which a recipient removes to another State.

On the death of a recipient of this category of assistance, if he has assets, the local unit shall send prompt notice and full information on these facts to the appropriate local unit of the other State, if the recipient is known to have received this category of assistance formerly from the other State.

SUPREME COURT, U. S.

FILED

APR 17 1968

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. [redacted] 9

BERNARD SHAPIRO, Welfare Commissioner of Connecticut, *Appellant*,

—v.—

VIVIAN THOMPSON, *Appellee*.

No. [redacted] 33

WALTER E. WASHINGTON, *et al.*, *Appellants*,

—v.—

MINNIE HARRELL, *et al.*, *Appellees*.

No. [redacted] 34

ROGER A. REYNOLDS, *et al.*, *Appellants*,

—v.—

JUANITA SMITH, individually, and by her, her minor children, *et al.*, *Appellees*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT, THE DISTRICT OF COLUMBIA, AND THE EASTERN DISTRICT OF PENNSYLVANIA, RESPECTIVELY

BRIEF *AMICI CURIAE* OF THE CENTER ON SOCIAL WELFARE POLICY AND LAW, TRAVELERS AID ASSOCIATION OF AMERICA, NATIONAL ASSOCIATION OF SOCIAL WORKERS, INC., CITIZENS COMMITTEE FOR CHILDREN OF NEW YORK, INC., AND THIRTEEN LEGAL SERVICES OFFICES NOW PROSECUTING SIMILAR CASES

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No. 1138

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Appellants,

—v.—

JUANITA SMITH, individually, and by her, her minor children, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT, THE DISTRICT OF COLUMBIA, AND THE EASTERN DISTRICT OF PENNSYLVANIA, RESPECTIVELY

BRIEF *AMICI CURIAE* OF THE CENTER ON SOCIAL WELFARE POLICY AND LAW, TRAVELERS AID ASSOCIATION OF AMERICA, NATIONAL ASSOCIATION OF SOCIAL WORKERS, INC., CITIZENS COMMITTEE FOR CHILDREN OF NEW YORK, INC., AND THIRTEEN LEGAL SERVICES OFFICES NOW PROSECUTING SIMILAR CASES

Interest of *Amici Curiae*

The Center on Social Welfare Policy and Law is the specialized welfare law resource of the Legal Services Program of the Office of Economic Opportunity. Affiliated with the Schools of Law and Social Work of Columbia University, the Center undertakes research pertaining to the legal rights of welfare beneficiaries and supports OEO-funded legal service programs and other legal organizations through education and assistance in the preparation of important litigation. In this capacity the Center has rendered substantial assistance in most of the cases challenging residence requirements in public assistance, and attorneys from its staff appear on many of the papers. The Center also maintains the nation's only comprehensive private collection of state public assistance regulations and manuals. The Center, together with the federally-funded legal service programs throughout the nation, has a vital interest in presenting to this Court the full range of issues raised and rules affected by this case.

Travelers Aid Association of America is a non-profit federation of 86 local Travelers Aid Agencies with 825 Cooperating Representatives throughout the country, which gave assistance and counseling services to over a million people who moved last year. Because its operations and clients are greatly affected by public welfare provisions, the Association, based on long experience, has long opposed the various residence requirements for public assistance now in existence. Its local agencies time and again have had to render whatever assistance they could to meet the desperate needs of people denied assistance for lack of residence.

The National Association of Social Workers, Inc., a nonprofit corporation under the laws of Delaware, is the professional membership organization for 48,000 social workers in 40 states and Puerto Rico. The Association works to improve social welfare services in American communities by preventing sources of deprivation and distress, enabling people to live more productively, and wiping out problems of delinquency and family disintegration, poverty and unprotected old age. Its members work to facilitate social progress in our community and national life, and have in this connection often given first-hand testimony out of their professional experience before national, state and local legislative committees.

Citizens' Committee for Children of New York, Inc., is a membership corporation composed of professional and lay members who are interested in improving living conditions for all children. Because the Citizens' Committee believes that society must recognize its responsibilities to help every child whose family is unable to provide for him, the Citizens' Committee is working for improved services and attitudes, better education, better health services, better mental health care, better housing and government and private acceptance of the child's legal and moral rights. The Citizens' Committee has assisted needy persons in asserting their mutual rights and in challenging the constitutionality and fairness of many welfare laws and regulations.

Legal Aid Society of the Pima County Bar Association (Tucson, Arizona); Legal Aid Society of Metropolitan Denver (Colorado); Community Law Service (Wilmington,

Delaware); Economic Opportunity Legal Services Program, Inc. (Miami, Florida); Legal Aid Bureau (Chicago, Illinois); Legal Services Program of Black Hawk County Legal Aid Society (Waterloo, Iowa); Legal Aid Bureau, Inc. (Baltimore, Maryland); Community Legal Assistance Office (Cambridge, Massachusetts); Legal Aid Society of Calhoun County (Battle Creek, Michigan); The Legal Aid Society of Minneapolis (Minnesota); Legal Aid Society of Cleveland (Ohio); Legal Aid Service, Multnomah Bar Association (Portland, Oregon); and Legal Services Center (Seattle, Washington); are now representing plaintiffs in the actions in their respective states set forth in Appendix B. These offices are therefore directly and vitally concerned with the decision of this Court in the three cases now under consideration. That decision will determine the right of their clients and, in many cases, the class they represent, to receive desperately needed public assistance aid.

Statement of the Case

> "In most states, there is a residency requirement, generally averaging around a year, before a person is eligible to receive welfare. These state regulations were enacted to discourage persons from moving from one state to another to take advantage of higher welfare payments. In fact, they appear to have had little, if any, impact on migration and have frequently served to prevent those in greatest need—desperately poor families arriving in a strange city—from receiving the boost that might give them a fresh start."
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> *Report of the National Advisory Commission on Civil Disorders* (March 1, 1968)[1]

[1] Bantam Books, Inc., New York City, pp. 459-460.

Public financial aid to certain needy persons is provided in all states and territories of the United States. Under the "categorical assistance" programs established by the Social Security Act of 1935, as amended (Aid to Families with Dependent Children, hereinafter "AFDC"; Old Age Assistance, hereinafter "OAA"; Aid to the Permanently and Totally Disabled, hereinafter "APTD"; and Aid to the Blind, hereinafter "AB"[2]), aid based mostly upon contributions from the Federal Government[3] was given to close to 8 million needy persons in September 1967.[4] The "general assistance" program (hereinafter "GA"), financed entirely by the states and localities, provided aid to over 729,000 persons in September 1967.[5]

The federal categorical programs and the locally financed general assistance programs are designed as residual programs. Under these programs the very basic necessities—food, shelter, clothing—are furnished to disadvantaged and impoverished families, many of which are ineligible for or who have exhausted the often higher benefits of the

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[2] 42 U. S. C. §§301 *et seq.*, 601 *et seq.*, 1201 *et seq.*, and 1351 *et seq.* Other categories not involved in this case are Medical Assistance for the Aged and "Medicaid," 42 U. S. C. §§306 and 1396.

[3] The Federal Government contributed $2,958,602 of the $5,476,025 spent in all public assistance programs in 1965, including those which received no federal funds. Federal assistance payments have exceeded 54% of all payments every year since 1962, 50% of all payments every year since 1957, and 45% of all payments every year since 1949. During the late 1930's the Federal Government's share never exceeded 23.2%. United States Department of Health, Education and Welfare, *Welfare in Review*, 1966 Statistical Supplement, p. 17.

[4] In September 1967 there were 7,879,000 persons receiving federally-aided public assistance. The number had increased steadliy each month of the year. *Welfare in Review*, Jan.-Feb. 1968, p. 43.

[5] *Welfare in Review, Ibid.*

contributory programs, such as state unemployment and workmen's compensation and federal Old-Age, Survivors, Disability and Health Insurance. Eligibility for the latter programs almost always requires designated periods of contribution and defined employment; the principal criterion of the residual programs is that of need.

A person meeting financial and other eligibility criteria has a statutory right to benefits under the federal law and the laws of the various states.[6] Among the non-financial eligibility standards in most, but not all, states is a requirement of residence in the state for a certain period of time prior to application.[7] Federal statutes do not provide for durational residency requirements as a condition of eligibility, but they do prohibit such requirements in excess of one year in the AFDC program[8] and in excess of one continuous year prior to application and five of the last nine years in the OAA, AB and APTD programs.[9] Such requirements are flatly prohibited in the recently enacted Medical Assistance to the Aged and "Medicaid" programs.[10] Requirements in the wholly state-financed general assistance

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[6] *Smith* v. *King*, 277 F. Supp. 31, 38 (M. D. Ala. 1967).

[7] These requirements were summarized in Appendix A to the Motion of Appellants and Appellees to Set Down this Appeal for Hearing with *Shapiro* v. *Thompson*, filed with this Court in *Reynolds* v. *Smith*, No. 1138, and also appear in Note, *Residence Requirements in State Public Welfare Statutes*, 51 Iowa L. Rev. 1080, 1091-1095 (1966).

[8] 42 U. S. C. §602(b).

[9] 42 U. S. C. §§302(b)(2)(A), 1202(b)1, and 1352(b)(1).

[10] 42 U. S. C. §§302(b)(2)(B) and 1396a(b)(3). In August 1967 those federally-aided medical payments amounted to well over one-third of all public assistance costs. *Welfare in Review*, Jan.-Feb. 1968, p. 27.

programs are frequently one year, though some are as many as five.[11]

As an adjunct to such restrictions on eligibility, many states have laws and regulations providing for the compulsory removal and return or institutionalization of persons claiming public assistance who fail to satisfy the durational residence requirement;[12] some states have provisions for the compulsory removal from the state of those likely to become a public charge at some future time.[13] Others prohibit persons from assisting or advising indigents to move from one municipality to another or from one state to another.[14] The Connecticut residency provision permanently denies any state-financed general assistance to persons who claim assistance before satisfying the one year residency requirement.[15] The constitutionality of durational residency requirements is challenged in the AFDC cases now before

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[11] See sources cited in footnote 7 *supra*.

[12] See, e.g., Mass. Ann. Laws C. 122 §21 (1958), and Minn. Stat. Ann. §§262.11 and 263.03(2) (1947). The Minnesota statute provides for physical removal within the state without a court order. The Connecticut Supreme Court held that state's compulsory removal law, Conn. Gen. Stat. §17-273a, constitutional, noting that this "power of removal . . . has been claimed by Connecticut since long before the adoption of the federal constitution . . ." and that the statute "took substantially its present form as early as 1796." *State* v. *Doe*, 149 Conn. 216, 222, 178 A. 2d 271, 274 (1962). The provision was repealed by 1963 Public Act 501, §4. See also the application of a compulsory return provision, now apparently repealed, in *Anderson* v. *Miller*, 120 Pa. Super. 463, 182 A. 742 (1936).

[13] See, e.g., Iowa Code Ann. §252.18 (1949). See generally Daniel R. Mandelker, *Exclusion and Removal Legislation*, 1956 Wisc. L. Rev. 57, 66-67.

[14] See, e.g., Sec. 49.12(4) Wisc. Stat. (1957).

[15] Conn. Gen. Stat. Sec. 17-2d (Supp. 1966).

this Court and the scores of cases now pending before three-judge courts around the country.[16]

The patchwork of durational residence requirements found in state statutes results in a number of disqualifying classifications among equally destitute families. Those with residence of less than one, three or five years are denied the basic necessities available to others similarly situated except for their greater periods of settlement. Similarly objectionable distinctions are drawn among the various programs under which aid is sought, with varied durational residence requirements frequently being imposed on the different programs. As a result of numerous state statutory provisions waiving the residency requirement where the former state of residence has no such requirement[17] and reciprocity agreements among two or more states providing for mutual waiver, persons seeking aid under the same program in the same state are treated differently solely because of residence provisions or agreements of the state in which they previously resided.[18]

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[16] The facts in these pending cases are set forth in Appendix B *infra*.

[17] See, e.g., 62 Penn. Stat. §432(6) (1967), the statute before this Court, and Wisc. Stat. §49.61(2)(b) (1967).

[18] A further discrimination results in the AFDC program in many states which grant aid if the relative with whom the child is living has a year of residence. See, e.g., Rev. Code Wash. §74.12.030 (1967 Supp.). Thus aid may be obtainable only if the child leaves his mother.

Summary of Argument

Disqualifying classifications based on period of settlement are found in a number of state administered public assistance programs, most of which are financed in large part by the Federal Government. Under these programs the essentials of life are provided to many of the 30 million Americans with incomes below that of the poverty level. The residency provisions in issue here impose distinctions among these families not because these people have differences in need, hope or ability but because some have changed their place of residency from one State to another within the last one, three or five years. Accordingly these requirements do not serve, but undermine, the avowed purposes of the residual assistance programs to help the nation's poor achieve self-care and self-support and to help them maintain themselves, their families and, most important, human dignity.

The array of state settlement and residency requirements challenged herein are the direct descendants of a series of enactments which have severely and deliberately restricted the movements of indigents for over 600 years. They find their roots and purposes in a host of ancient settlement, residency and removal laws which reflect the insularity and class suspicions of another age and country. This very insularity and prejudice is echoed in the argument advanced before this Court that today's residency laws are necessary to protect the fisc from the predatory claims and fraud of outsiders and newcomers. We submit that these requirements are the vestigal remnants of a localism which changed conditions, attitudes and a national society have rendered irrelevant and invidious.

The immediate objective, ultimate impact and historical context of residency laws reflect a deliberate state policy to discourage the entry and settlement of poor people and to facilitate their removal in case of need. That purpose is constitutionally impermissible. These laws do not serve any other valid state policy. Particularly, they are not a needed barrier against the assumed raids on the "high" benefits of public assistance programs. Overwhelming evidence shows that poor people move and settle for the same reasons other people do: to search for opportunity, to be near their family, and generally to find new associates, a new environment and a better life. We submit that these rights are constitutionally protected and that a classification which disqualifies because of their exercise denies the equal protection of the laws.

I.

This array of state settlement and residency requirements finds its roots and its explanation in the Elizabethan poor laws and transference of those laws to colonial and post-colonial America.*

The residence requirements challenged herein are the direct descendants of a series of enactments which have severely and deliberately restricted the movement of indigents for over 600 years. These restrictions, appearing repeatedly in English statutes of the Fourteenth through Seventeenth Centuries, culminated in the Act of Settlement

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* Amici gratefully acknowledge that the statistical and historical material in this brief was substantially prepared by Ronald B. Dear, a doctoral candidate at the Columbia University School of Social Work. For a fuller exposition of the Elizabethan and American poor laws, see Appendix A.

and Removal of 1662[19]—the source upon which American colonists drew most heavily in framing their own statutes. These restrictions took a variety of forms. Those most closely related to the statutes before the Court limited public responsibility for the relief of poverty to those persons who were residents of the local community.[20] Those provisions were themselves descendants of earlier laws, antedating public assistance, which permitted the solicitation of alms only within the indigent's parish.[21] The desire to limit the mobility of the poor was further reflected in the removal provisions of the aforementioned Act of 1662, which empowered public authorities forcibly to return an indigent to his place of settlement whether or not he had sought or might request aid, a procedure which survives to this very day.[22] Finally, the English Law also provided severe criminal penalties for begging and leaving employment[23] and even for leaving one's place of settlement without permission.[24]

The purposes underlying these restrictive provisions which are the forerunners of the laws before this Court are manifold, and all are, in amici's eyes, both anachronistic and constitutionally impermissible. The earliest of these restrictive laws, the Statutes of Laborers of Edward III, and many of their successors, were, in the view of con-

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[19] 13 & 14 Charles II c. 12 (1662).

[20] 14 Elizabeth c. 5 (1572); 39 Elizabeth c. 3 (1598).

[21] 19 Henry VII c. 12 (1503); 22 Henry VII c. 12 (1530-31).

[22] See note 12 *supra*.

[23] See, e.g., 23 Edward III c. 1 (1349), 5 Elizabeth c. 4 (1562), and 14 Elizabeth c. 5 (1572).

[24] 12 Richard II c. 3 (1388).

cerned scholars, clearly designed to assure feudal lords an adequate supply of agricultural labor.[25] In service of this objective, no worker was permitted to go "out of the town where he dwelleth in the winter, to serve in the summer. . . ."[26] Moreover, "No servant or laborer . . . shall depart at the end of his term . . . to serve or dwell elsewhere . . . unless he bring a letter [under the king's seal]."[27] In later years, this design was displaced by other concerns. The poor were feared as a source of criminal disorder. As Parliament found, "In all places throughout this realm, vagabonds and beggars have of long time increased [producing] continual thefts, murders, and other heinous offences and great enormities. . . ."[28] Their travel was thought to encourage the spread of disease and pestilence. Anticipating problems of modern occurrence, the restrictions also betrayed a fear of urban congestion and attendant disorder.[29]

Also important to the understanding of these restrictions is an appreciation of the central position enjoyed by the local parish in the political organization of the society out of which these restrictions arose. During much of the period in question, the population of local communities formed a highly stable and well integrated group. Indi-

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[25] George Nicholls, *A History of the English Poor Law* (London, P. S. King & Son, 1904), pp. 34-41, 57; Karl de Schweinitz, *England's Road to Social Security* (New York, A. S. Barnes & Co., 1961), p. 5.

[26] 25 Edward III c. 7 (1351) Second Statute of Laborers. See also 23 Edward III c. 7 (1349) First Statute of Laborers.

[27] 12 Richard III c. 3 (1388).

[28] 22 Henry VIII c. 12 (1530-31).

[29] Dorothy Marshall, *The English Poor in the Eighteenth Century* (London, George Rutledge, 1926), Chaps. V and VI.

viduals typically lived their entire lives and made their economic contribution within the confines of a single parish. The communities were small enough that members were personally acquainted with one another, and engaged in a variety of activities organized for mutual support and comfort. What is more, the center of political power was local, with the central government imposing upon persons' lives only in the most sporadic and occasional way. Community membership was more important than National citizenship. In such a context, the limitation of public responsibility to members of a local community may have made a good deal of sense.

American history clearly demonstrates that the colonists brought with them many of the attitudes underlying these restrictions on mobility. Indicative of this is the fact that "paupers" and "vagabonds" were excluded from the privilege of "free ingress and regress to and from any other state" by the Articles of Confederation.[30] Even more important, one finds the entire panoply of restrictive measures described above imported into the early law of the colonies and their successor states. Indeed, one finds more than a small part of them in the laws extant today.

Amici contend that today's residence requirements and their underlying purposes can be properly understood only when set in their proper historical context. These requirements are the vestigial remnants of a localism which changed conditions have rendered irrelevant and invidious. They are an unjustifiable anachronism reflecting attitudes toward the poor which offend modern notions of equal protection.

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[30] Art. IV (1777).

II.

Statutory disentitlement of persons for the sole reason that they have recently exercised their right to travel and settle in another state is without any rational or permissible justification and hence denies such persons the equal protection of the laws.

A. *Durational settlement requirements do not serve but conflict with the avowed purposes and objectives of residual public assistance programs.*

Plainly the durational residency tests do not serve the stated purposes and objectives of public assistance programs. Those purposes as set forth in the federal programs are to help needy individuals to maintain themselves, to achieve self-support and self-care, and, in the case of AFDC, to maintain and strengthen family life.[21] Similar purposes appear in the relevant state statutes. Since duration of settlement in a state has nothing at all to do with the fundamental and often desperate needs of assistance claimants, the so-called residency requirements bear no relationship to these purposes. They do, however, quite obviously undermine them.

Persons and families denied aid for lack of residence must either live under the most deprived conditions or move on to some other place. Many who remain are dependent upon private charity or impoverished relatives.[22] The family unit is often torn asunder, frequently by removing

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[21] 42 U. S. C. §§301, 601, 1201 and 1351.

[22] See, e.g., most of the fact patterns in the cases in Appendix B as well as in all of the cases now before this Court.

children from their homes and placing them at substantial public expense in foster homes or institutions whose benefits are not dependent on residency." Those who are able to return often go back to conditions from which they hopefully and wisely fled. Mrs. Ramos and Mrs. Mantell, the plaintiffs in *Ramos* v. *Health and Social Services Board*, 276 F. Supp. 474 (D. Wisc., 1967), and *Mantell* v. *Dandridge*, Civil Action No. 18792 (D. Md., 1967) were urged to leave their native state and go back to the state where their husbands who had grossly mistreated them resided. Mrs. Brewer, plaintiff in *Johnson* v. *Robinson*, Civil Action No. 67-C-1883 (N. D. Ill., Feb. 20, 1968), had no place to go, since she had moved from Illinois to California in 1965 and back to Illinois in 1967 and was not eligible for OAA in either state. Many migratory workers are equally stateless and have no place to which to return. Neither the relief of need nor human dignity is served by this denial of aid for lack of residency.

B. ***A purposeful state policy to discourage the entry and settlement of poor people and to facilitate their removal in case of need is constitutionally proscribed.***

According to recent studies of the Social Security Administration there are now more than 29.7 million people in this country with incomes below minimal subsistence

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[33] For the practice in Pennsylvania, see *Reynolds* v. *Smith*, App. pp. 123a to 125a. Institutionalization is more likely than foster care. The state hearing examiner during the administrative hearing prior to the institution of *Mantell* v. *Dandridge*, Civil Action No. 18792 (D. Md. 1967), stated in connection with the residence requirements that there have been cases of children being placed in foster care and being supported by state money "because we couldn't give them Aid to Dependent Children." Transcript of Appeal Hearing, August 3, 1967, p. 11.

levels.[34] The public assistance laws with which we deal in this case by their very nature and terms apply exclusively to America's poor, those 29.7 millions with below subsistence incomes. These people are not only economically disadvantaged; they are politically weak if not impotent. They are told by the residency laws at issue here that they may not change their place of settlement from one state to another without losing the government's guarantee of some assistance in case of disappointed hopes, adversity and dire need.

We submit that such restrictions affecting the mobility and settlement of such large numbers of disadvantaged Americans warrants the closest constitutional scrutiny. We ask that the constitutionality of this classification be considered "in terms of its immediate objective, its ultimate impact and its historical context and the conditions existing prior to its enactment." *Reitman* v. *Mulkey,* 387 U. S. 369, 373 (1967).

The states before this Court do not openly admit that the purpose of residency requirements for public assistance is to discourage poor people from coming and remaining in a state of their choice. The reasons are not far to seek; *Crandall* v. *Nevada,* 73 U. S. 35 (1867), *Edwards* v. *California,* 314 U. S. 160 (1941) and *United States* v. *Guest,* 383 U. S. 745 (1966). Whether admitted or not, however, such discouragement is the general purpose and obvious impact of durational residency conditions. The historical justifications for very similar residence restrictions on public assistance, removal laws, and the like—to affix a place of settlement for the poor and to prevent movement of the poor

[34] *Report of the National Advisory Commission on Civil Disorders, op. cit.,* p. 258.

outside the settlement—and the clear evolution of today's residency requirements and removal laws from these historical forerunners unequivocally attests to this overall purpose. So too does the attempted explanation by the states of their residency requirements in terms of the need to exclude nonresidents from their "high" welfare benefits and the correlative need to husband and guard scarce welfare resources.[35]

In their view, the residency requirement is merely a means of allocating a limited amount of resources among welfare claimants. Plainly the fact that money is saved for allocation to others does not provide a justification for an eligibility condition. Excluding blue-eyed Americans would also limit the number of claimants. The residency criterion is not a justifiable restriction; it is a particular classification whose immediate aim and operation is to deny aid to persons equally needy and equally qualified, save in one respect: that they have recently left one state and settled in another. Unless the classification is wholly arbitrary and whimsical, this restriction must be based on the notion that persons who have recently migrated and settled are somehow less worthy of public assistance, as they were deemed centuries ago. Unless the state is indifferent to the fate and welfare of needy persons within its borders, which the very existence of residual welfare laws refutes, the purpose of the classification must be to discourage persons from coming into the state and to encourage them to leave once they have come. Indeed the states before this Court concede as much insofar as they argue that such laws are necessary to protect their own "high" welfare benefits from the claims of newcomers or outsiders. The use to

[35] See, e.g., California *amicus* brief, p. 6.

which these residency requirements are put—claimants of limited residency are asked and paid to leave—quite eloquently confirms this purpose.[36]

It is submitted this overall purpose is an impermissible restriction on the exercise of protected rights to travel, to settle, to associate and to search for a better life.

It is well established that the Constitution of the United States protects and guarantees the right of every citizen to travel freely from state to state and to settle in the state of his choosing:

> "Freedom of movement across frontiers in either direction, and inside frontiers, was a part of our heritage .... Freedom of movement is basis in our scheme of values." *Kent* v. *Dulles,* 357 U. S. 116, 126 (1958).

The right to travel from state to state "occupies a position fundamental to our Federal Union." *United States* v. *Guest,* 383 U. S. 745, 757 (1966). It has long been established that a state cannot impose barriers or impediments to the movement of goods across state lines, even where those goods are in search of a market in the state of destination and restriction.[37] It is equally established that a state may not impose such restrictions or barriers to the movement

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[36] See, *e.g.,* Conn. Gen. Stat. 17-2d (1965 Supp.) and Connecticut State Welfare Department *Manual* Sec. 219.3 under which even the customary emergency aid is denied to a person refusing removal. One Michigan county spent $28,000 to remove indigents in 1965. Comment, *The Michigan Settlement and Removal Laws in an Historical Perspective,* 45 J. Urban Law 130, 175 (1967).

[37] *Baldwin* v. *Seelig,* 294 U. S. 511, 523 (1935): "The Constitution ... was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division." See also *Dean Milk Co.* v. *City of Madison,* 340 U. S. 349 (1951).

of persons across state lines. The search for new associates, a new environment, and a market for their talents and endeavors is constitutionally protected. *Crandall* v. *Nevada, supra; Edwards* v. *California, supra.*[38] The right to travel is not merely a right to cross state lines or to pass through a state; it is also a right to settle in a state:

> "That choice of residence was subject to local approval is contrary to the inescapable implications of the westward movement of our civilization." [39]

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[38] "The conclusion that the right of free movement is a right of *national* citizenship stands on firm historical ground. If a state tax on that movement, as in the *Crandall* case, is invalid, *a fortiori* a state statute which obstructs or in substance prevents that movement must fall. That result necessarily follows unless perchance a State can curtail the right of free movement of those who are poor or destitute. But to allow such an exception to be engrafted on the rights of *national* citizenship would be to contravene every conception of national unity. It would also introduce a caste system utterly incompatible with the spirit of our system of government. It would permit those who were stigmatized by a State as indigents, paupers, or vagabonds to be relegated to an inferior class of citizenship. It would prevent a citizen because he was poor from seeking new horizons in other states. It might thus withhold from large segments of our people that mobility which is basic to any guarantee of freedom of opportunity. The result would be a substantial dilution of the rights of *national* citizenship, a serious impairment of the principles of equality." *Edwards* v. *California, supra,* at 181 (Douglas, *J.*, concurring).

[39] *Edwards* v. *California, supra,* at 183 (Jackson, *J.*, concurring). Justice Jackson also stated that:

> ". . . [I]t is a privilege of citizenship of the United States, protected from state abridgment, to enter any state of the Union, either for temporary sojourn or for the establishment of permanent residence therein and for gaining resultant citizenship thereof. If national citizenship means less than this, it means nothing." *Ibid.*

This Court more recently observed: "Travel abroad, like travel within the country, may be necessary for a livelihood. It may be as close to the heart of the individual as the choice of what he eats, or wears, or reads." *Kent* v. *Dulles,* 357 U. S. 116, 126 (1958).

(*footnote continued on next page*)

With regard to the right of citizens to move and to settle, we are one nation, and not a collection of separate Elizabethan communities.

Plainly, these rights are available to all persons, quite without regard to race, religion or economic standing. *Sherbert* v. *Verner*, 374 U. S. 398 (1963); *Yick Wo* v. *Hopkins*, 118 U. S. 356 (1886).[40] The purpose of deterring poor people from travelling and settling is constitutionally impermissible.

The states seek to avoid the impact of these decisions by asserting that residency requirements do not forbid anyone to enter or remain in the state, including the poor. The denial of assistance to the destitute is said "merely" and "incidentally" to make the state a less attractive place for some people to settle in, with the same effect on freedom of movement as higher taxes or stricter licensing standards. No criminal sanctions are imposed on those who

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As shall be set forth in the next section, a large proportion of those denied aid for lack of residency travelled to join parents, children, or other relatives. For these people, the interference with their rights to travel and settle produced by the residence requirements also impinges upon their enjoyment of this cherished association. Cf. *Griswold* v. *Connecticut*, 381 U. S. 479 (1965) in which this Court recognized that marriage is a constitutionally protected association. Mr. Justice Douglas recently stated:

> "Freedom of movement, at home and abroad, is important for job and business opportunities—for cultural, political and social activities—for all the commingling which gregarious man enjoys." *Aptheker* v. *Secretary of State*, 378 U. S. 500, 519-520 (1964) (Douglas, J., concurring).

[40] *Fleming* v. *Nestor*, 363 U. S. 603 (1960), is not apposite here, since it dealt with the constitutionality of denying Social Security benefits to persons or on behalf of persons who were no longer in the United States and who could not return to the United States. We deal here with the rights of persons actually present and in need in the respective states.

come and even on those who remain without private means of support. These attempted distinctions quietly ignore, one, the difference between statutes which affect all persons equally and laws which by their very terms purposefully discriminate against persons who come from another state, denying to such persons solely by reason of past travel and recent settlement in the state benefits available to all others similarly situated; and, two, the significant impact on recent residents of denying to them the "means of living [and] a material right essential to the enjoyment of life." *Yick Wo* v. *Hopkins, supra,* at 370 (1886). What was at stake in *Edwards,* moreover, was not California's imposition of a criminal sanction, but whether California could constitutionally prohibit persons from aiding indigents to enter its domain.

At this point the states urge, somewhat inconsistently, that persons are not substantially deterred from entering a state because of durational residency requirements. We agree. Public assistance laws are not life insurance policies and people do not shop around among the alternative plans before embarking on the search for a new environment, new opportunity and associates. Rather, residency requirements have their impact after such persons have traveled and settled in the state; where hopes are unfulfilled and adversity ensues, such persons are told they may not ask the state for basic assistance except payment for their removal to another state because they have recently and not so recently exercised their protected rights to travel and settle. This is a denial of a statutory entitlement, quite akin to a forfeiture if that be needed, solely because of the exercise of constitutionally protected rights. The states may not impose a sanction "upon those who exercise a

right guaranteed by the constitution." *Harman* v. *Forssenius*, 380 U. S. 528, 540 (1965). See also *Sherbert* v. *Verner, supra; Speiser* v. *Randall*, 357 U. S. 513 (1958); and *Frost Trucking Co.* v. *R.R. Comm'n*, 271 U. S. 583 (1926).

C. *In light of the reasons for the mobility of people in America, and the experience of states without residency requirements, the states' asserted purpose of preventing raids on the fisc by persons coming to the state to claim public assistance cannot rationally support durational residency requirements.*

Even if we assume *arguendo* that a state may properly deny assistance to persons who come to the state in order to claim such assistance,[41] residency requirements do not serve to distinguish between those who come to claim and those who come for other reasons. Rather they flatly establish a broad and conclusive presumption that those who have lived in the state for less than one or five years have come to the state to claim public assistance.[42] In a society in which the movement of persons is a distinctive and sacred hallmark, such a presumption is unsupportable. Studies of mobility in America, including that of recent migrants claiming assistance, and the actual experience of states without residency conditions, including those with substantial relative benefits, lay the ghost that a term of residency is a needed bulwark against the Huns of welfare.

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[41] The three-judge court in *Thompson* v. *Shapiro*, 270 F. Supp. 331, 337 (D. Conn. 1967) would not have permitted a classification based on that purpose.

[42] Such an irrebuttable presumption, contrary to fact, is invalid. *Heiner* v. *Donnan*, 285 U. S. 312 (1932); *Carrington* v. *Rash*, 380 U. S. 89 (1965).

Geographical, as well as social and economic, mobility has long been a distinctive feature of American life. Close to seven million Americans change their place of settlement or residence from one state to another annually; the rate of movement has remained markedly constant over the past two decades, with about 3.5% of the population moving across a state line each year.[43] While much of this movement is back and forth across the country,[44] fitting into no defined pattern, for decades there have been persistent streams to the West, out of the South, and particularly from rural areas to the cities of America.[45] This, of course,

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[43] United States Bureau of the Census, *Current Population Reports*, Series P-20, No. 156, "Mobility of the Population of the United States: March 1965 and March 1966," Washington, D. C., 1966, p. 9.

[44] At least 11.5% of all the people in each state in 1960 had been born in another state (not counting those born in another country). One-fourth of the people in the United States in 1960 had been born in a state other than that in which they were residing. The percentage of residents born outside of Connecticut, Washington, D. C., and Pennsylvania is 37.3%, 56.6%, and 16.8% respectively. United States Bureau of the Census, *United States Census of Population, 1960 Subject Reports*, State of Birth, Final Report PC(2)-2A, Table 9, p. 6. This type of movement is demonstrated in the public assistance area. During the three month period in 1959 studied in Pennsylvania, persons with less than a year of residence applying for public assistance came mainly from the following states: Ohio, 130; New Jersey, 86; New York, 84; Florida, 57; Maryland, 38; California, 34; and Michigan, 30. Commonwealth of Pennsylvania, Department of Public Welfare, *Effect of Length-of-Residence Requirement on Eligibility for Public Assistance in Pennsylvania* (mimeo), March 5, 1959, p. 1.

[45] John B. Lansing and Eva Mueller, *The Geographic Mobility of Labor* (Institute for Social Research, Univ. of Michigan, 1967), p. 33 and sources cited therein. The percentage of the population engaged in agriculture has declined from 90% in 1759, to 70% in 1840, to 30% in 1915, to 5.9% in 1966. Thirty percent of all heads of families were born on farms and now live in towns or urban areas. *Ibid.*, p. 36. This compares closely with the finding that about 25% of the mothers receiving public assistance in New York

is a result of expanding industrialization, with its promise of new opportunity.

Somewhere between half and three-quarters of these seven million American migrants move to better their economic positions by going to a job or seeking employment; about one-fourth of the persons studied moved for noneconomic reasons, the principal one being to reside near one's family or close relatives.[46] Many of these people were returning to their place of birth or former residence.[47] Re-

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City were reared on farms. Lawrence Podell, *Families on Welfare in New York City, Preliminary Report No. 4*, "Mothers: Nativity and Immigration" (The Center for Social Research, City University of New York, 1968), p. 5.

[46] Over three-fourths of all males 25 to 44 move between states for job-related reasons: 30.7% to take a job; 9.9% to look for work; 13.6% to transfer jobs; 19.8% to enter or leave armed forces; 1.8% for easier commuting. United States Bureau of the Census, *Current Population Reports*, Series P-20, No. 154, Aug. 1966. See also Mueller and Lansing, *op. cit.*, p. 38.

Migrants have achieved higher income and greater employment than those who stayed behind. John B. Lansing and James N. Morgan, "The Effect of Geographical Mobility on Income," II *The Journal of Human Resources* 449, 460 (Fall 1967); Samuel Saben, "Geographic Mobility and Employment Status," *Monthly Labor Review*, August 1964, pp. 873-881.

Older poor persons most frequently migrate to join their children. Janet Pleak, "Reports of Payments to Out-of-State Recipients," 9 *Public Welfare* 122 (1951).

[47] Over a twelve year period 9% of those moving returned to their birthplaces and another 11% to an area of prior residence. Lansing and Mueller, *op. cit.*, p. 34. The only available census data on return migration gives the total residents of a state in 1960 who had been born in that state but had been living elsewhere in 1955. The range was from just under 1% to 3.6%. Percentages for states discussed herein are Connecticut, .9%; Washington, D. C., 1.4%; Pennsylvania, 1.2%, and Maine, 1.5%. United States Bureau of the Census, United States Census of Population, *1960 Subject Reports*, Lifetime and Recent Migrations, Final Report PC(2)-2D, p. 16, Table 5.

flecting the reasons why people migrate, the most salient personal characteristics of mobility are age and educational level; mobility drops off sharply at age 35 and sharply increases with educational level.[48]

The mobility of poor people in our society, especially poor colored people,[49] stands in sharp contract to the above trends. The percentage of people with poverty or deprivation level incomes who move is less than that of Americans generally.[50] But the reasons why poor people migrate are not essentially dissimilar. Although a greater number of these people move for family reasons, a substantial number migrate to other states in search of economic opportunity. Significantly, poor people who have recently received a form of public assistance move no more, nor less, than those who have not claimed such assistance.[51] The receipt of public assistance, adequate in amount or not, would not seem to be a determinant of mobility.

A number of states have studied the reasons for migration of persons who subsequently seek public assistance. The following percentages of moves were made to return to relatives: Illinois, 60% (ADC only),[52] Florida, 39%,

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[48] Lansing and Mueller, *op. cit.*, pp. 39ff.

[49] Indeed, the difference between the greater white and lesser Negro mobility (even when similar social and economic groups are compared) has been increasing since World War II, when the rates were equal. *Ibid.*, pp. 263-4.

[50] United States Bureau of the Census, United States Census of Population, *1960 Subject Reports*, Mobility for States and State Economic Areas, Final Report PC(2)-2B, p. 30, Table 10.

[51] Lansing and Mueller, *op. cit.*, pp. 345-346.

[52] *Facts, Fallacies, and Future*, Greenleigh Associates, 1960.

(OAA only),[53] New York, approximately 25% (all programs),[54] and Maine, 59% (all programs).[55] Another substantial group had come seeking employment: Illinois, 17%; Florida, 24%; New York, over 25%; Maine, 1%; Pennsylvania, 64%.[56] The others came for reasons of health, better living conditions, and so forth.

A substantial number of these "new" residents who sought public assistance were people actually returning to the state in which they were born or previously resided. Maine, for example, reports that 65 out of 69 persons who became eligible for public assistance in the 16 months after Maine repealed its residency requirement were former resi-

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[53] *Effect of the Migration of Oldsters to Florida on the Old Age Assistance Program*, Florida Department of Public Welfare, 1955, p. 3.

[54] State of New York, Moreland Commission Report, *Public Welfare in the State of New York*, pp. 18ff.

[55] Summary of Maine's First 1⅓ Year's Experience Following Elimination of Durational Residence Requirements in Public Assistance (Sept. 1965-Dec. 1966), State of Maine Department of Health and Welfare, 1968 (mimeo), p. 2. Note also that 60% of the persons applying for aid during their first year in Pennsylvania had relatives in the state. *Reynolds* v. *Smith*, Appendix, p. 85a. See generally Roland J. E. Artigues, A Study of Residence Requirements and Reciprocal Agreements in the Public Assistance Programs of Pennsylvania (Doctoral Dissertation, School of Social Work, University of Pennsylvania, 1959).

[56] Same sources as above. The Pennsylvania figure includes some who also came for other reasons. Connecticut notes in its brief in *Shapiro* v. *Thompson*, No. 813 that "normally the elderly poor and the mentally or physically disabled come into the state because they previously lived here or to be near close relatives" (Brief, p. 4). Connecticut implies by omission that AFDC applicants do not come for such purposes, but the facts in the *Thompson* case show that the plaintiff was joining her mother. She was not, as is suggested, unwilling to work, but she was unable to since she was caring for one small child and was pregnant.

dents of that state, generally long-term residents, too.[57] Over 42% of those seeking aid during their first year in Pennsylvania had previous ties, generally substantial, to that state.[58] Significantly the plaintiffs denied assistance because of lack of durational residency in the cases now pending in California, District of Columbia, Illinois, Maryland, Massachusetts, Michigan, Oregon, Pennsylvania, South Carolina, Texas, Washington and Wisconsin are returning former residents of those states.

None of these studies revealed that any appreciable number of people came to these states, including those with higher assistance benefits than most other states, e.g., New York and Illinois, to obtain the benefits of the state's assistance laws.

Significant in this regard is the long held opposition of welfare case workers and welfare department officials to residency requirements; their experience too has been that people do not migrate for benefits.[58a]

Recent studies of states without residency restrictions confirm that poor people do not migrate in search of public assistance benefits. Most complete and recent data is available from New York, which extends perhaps the highest overall levels of assistance in the nation.

The number of persons on the rolls for all public assistance with less than a year's residence has declined from

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[57] *Summary of Maine's First 1⅓ Years*, etc., *op. cit.*

[58] Commonwealth of Pennsylvania, *Effect of Length-of-Residence Requirement, etc., op. cit.*, p. 6.

[58a] See National Social Welfare Assembly, *What They Say About Residence Laws* (3d ed., 1959); National Travelers Aid Association, *Residence Laws: Road Block to Human Welfare* (A Symposium) (1956).

2% in the late 1940's to .5% in 1966.[59] New York City, the focal point of migration from the South and Puerto Rico, reports that 3.7% of the persons on its rolls as of January 1968 had arrived within the last several years.[60] Many other states report that few persons on their rolls are recent arrivals.[61] In Maine, .008% of the applicants dur-

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[59] Letter from Harry Posman, Director, Office of Social Research and Statistics, State of New York Department of Social Services, March 6, 1968.

[60] Data supplied by Department of Social Services, City of New York.

The following conclusions were reached in a current study of mothers receiving public assistance in New York City:

> "About a fifth of the mothers on welfare were born in New York City, about a third in the South, and over a third in Puerto Rico.
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> "Three in ten publicly-assisted mothers were reared in this City; another three in ten were reared elsewhere but immigrated before they were 19 years of age. And still another three in ten arrived here as young adults. Only ten percent of the mothers on welfare came to this City when they were over 30 years of age.
>
> "Three-quarters of the mothers on welfare were either born in New York City or have lived here for over a decade. [Only 10% have been in New York City for less than 5 years.]"

Lawrence Podell, *Families on Welfare in New York City*, Preliminary Report No. 4, "Mothers' Nativity and Immigration" (The Center for Social Research, City University of New York, 1968) p. v.

[61] Maryland notes that 6% of the ADC caseload had less than 5 year's residence and that non-white new residents occupy the same proportions of the non-white in the caseloads as they do in the population at large. *A Report on Caseload Increase in the Aid to Families with Dependent Children Program, 1960-1966*, Maryland State Department of Public Welfare, July 1967, p. 19. Florida reports that 84% of the applicants for OAA had been in the state 10 years or more. *Oldsters, supra.* One-fourth of the Illinois ADC mothers had been born in the state, and another fourth had lived there 15 years or more. *Greenleigh, supra.* Less than 8% of the general assistance recipients in the District of Columbia had been

ing the 16 months in 1966 and 1967 following that state's elimination of residence requirements would have been ineligible under the former requirement.[62] The effect of repeal in Kentucky in 1956 "was not perceptible,"[63] and the experience of Rhode Island in 1944 and Hawaii in 1961 was similar.[64] Those states reporting on the impact of court invalidation show the same minimal effect.[65]

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residents for less than five years. *Characteristics of General Public Welfare Recipients,* Department of Public Welfare, Washington, D. C., Oct. 31, 1961 (mimeo). Louisiana reports that 9% of the OAA recipients had been in the state less than 9 years. State of Louisiana, Department of Public Welfare, *Report on the OAA Residence Study* (mimeo), October 1957, p. 1. A HEW survey of OAA recipients in 48 states showed that 40% had never lived outside of the state and that another third had moved into the state more than seven years prior to receiving aid. Information was not available on another 20%. United States Department of Health, Education and Welfare, Findings of the 1965 Survey of Old-Age Assistance Recipients, Part II, Table 39.

[62] *Summary of Maine's First 1⅓ Years,* etc., *op. cit.*

[63] Letter from John McCaslin, Director of Research and Statistics, Kentucky Department of Economic Security, dated March 12, 1968.

[64] G. Leet, "Rhode Island Abolishes Settlement," 18 Social Service Review, 283 (1944); Letter from William G. Among, Director, State of Hawaii Department of Social Services, April 1, 1968.

[65] Delaware gave aid in 150 additional cases during the last half of 1967. Report from Director, Delaware Department of Public Welfare to Hon. Raymond T. Evans, Chairman, Health and Welfare Committee, State Legislative, Jan. 1, 1968. The City of Milwaukee reported 11 additional cases in a one-month period. Milwaukee *Sentinel,* Dec. 23, 1967, p. 1. Maryland gave aid to an additional 30 to 40 cases during December 1967. "Expected Aid Rush Fizzles," The Baltimore Sun, Jan. 9, 1968, p. A12. The deputy State Welfare Director described this number as "infinitesimal." *Ibid.*

These cases, of course, involve mostly claimants in need within the states and not arrivals embarking on a search for a welfare haven since the decisions.

These studies confirm what was plain from the dictates of our economy and deeply embedded promises of our society. The people whose rights are at issue before this Court have done exactly what untold numbers of Americans have done for two centuries: They have gone elsewhere in search and hope of economic opportunity and betterment, of a new environment and associates for themselves and their families, and of settlement in another place where their families had gone before. The states before this Court invoke neither the common experience of Americans nor any empirical evidence to support their view that this age-old quest has now been replaced by the quest for the "high" benefits of residual public assistance. Rather they rely on the unstated and unproven assumption that poor people no longer share in the rich promise of American life. That assumption, we submit, is impermissible and hence cannot support the premise that residency requirements are necessary to keep the public assistance rolls within manageable dimensions.

D. ***Restricting public assistance to persons with "some investment in the community" and to "domiciliaries" provides no justification for durational residency requirements.***

Pennsylvania, and perhaps Connecticut, though not the District of Columbia, assert that the residency requirement carries out their policy of restricting public assistance to persons having "some investment in the community," by which they mean those who for at least one year have paid state and local taxes and have "inevitably promoted the economy by channeling privately organized finances into the community's streams of commerce."[66] This argument

[66] Pennsylvania Brief, p. 14. See also Connecticut Brief, p. 10.

simply will not square with Pennsylvania's and Connecticut's own treatment of public assistance claimants and with the character of the public assistance programs Pennsylvania and Connecticut administer. These states do not condition eligibility for any of their aid programs on either the payment of taxes or prior contributions to the economy. Indeed, claimants need not even have been a resident of these states for a year or for a day, so long as they came from a state with no residency requirement or with a reciprocity agreement, conditions which hardly relate to the economy or taxes of these states. On the other hand, these states by virtue of the settlement requirements deny aid to the many who have paid taxes to Pennsylvania and Connecticut and who have enriched their economy with private spending, such as migrant workers, returning former residents and persons from nearby states who have formerly worked in Pennsylvania or Connecticut. The federally-sponsored and financed programs, and local assistance too, are residual relief programs to provide some of the basic necessities to persons not eligible under the contributory programs, such as unemployment insurance. This late attempt to now characterize residual programs as basically contributory ones finds no support in the states' provisions and is in conflict with the Federal provisions, which do not allow for eligibility requirements based on prior spending or taxpaying.[67]

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[67] While the importance of suffrage and professional employment, the two areas in which residence requirements are most often discussed, are not to be doubted, the effect of the residence requirement on the individual is substantially different. A person's very means of existence is not threatened by delay in the exercise of the ballot. The person may pursue any livelihood, assured of the right to vote before too long. Few other political activities are restricted in the meantime. There may well be probable relation-

The District of Columbia now asserts that its residency rule incorporates a requirement of domicile and serves to exclude "persons merely sojourning temporarily with the jurisdiction."[68] There is no mention of domicile in the D. C. laws or the Federal provisions and D. C. does not condition aid on the claimant's intent to remain in the District. Domicile as such simply has not been a requirement in public assistance laws, historically or at present. And accordingly, there have been no administrative problems of determining intent. More fundamentally, transmogrifying residency into domicile does not alter the issues before this Court. Domicile imposes the same burdens on travel and settlement and denies assistance to equally needy people because of recent settlement, without any discrete justification for doing so.

E. *The balance of the justifications presented are without substance.*

A further reason pressed by Pennsylvania is the need to be able to predict the future size of the caseload for the purpose of obtaining sufficient appropriations. Yet that

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ship between *current* residence in the community and an ability to vote intelligently on local issues.

Restrictions on professional licensing strike closer to a person's livelihood and are therefore more suspect. The Florida Supreme Court held in *Mercer* v. *Hemmings*, 194 So. 2d 579 (Fla. 1966), *app. dism'd*, 389 U. S. 46 (1967), that the state's police power could be exercised to assure professional competence, but that durational residence per se could not be required: "Florida is not an island, nor is a visa or passport required of citizens of the United States upon entering it." 194 So. 2d at 584.

At any rate the indigents prosecuting the instant cases are not challenging any residence requirements other than those for public assistance.

[68] District of Columbia Brief, p. 10.

State's expert testified below that the residence requirement does not provide data used in the budgeting process and that the process would not be complicated by its removal (App. p. 95a). Moreover, Pennsylvania has stated in this action its approximate additional costs and the lack of substantial change in migration if the residence requirement is invalidated (App. pp. 94a-95a).[69] At any rate, utilization of the residence requirement for prediction is impossible without corresponding information on the number of persons who have entered the state within the last year. Neither Pennsylvania nor the other states compile such records. Many variables in economic and social conditions significantly affect the number of claimants; migration, a relatively steady figure, does not. The denial of public assistance (for up to five years in some states) because of a negligible, indeed nonexistent, value in predicting future caseload size is an afterthought but not a justification for residence requirements.[70] *Oyama* v. *California*, 332 U. S. 633 (1948); *Harman* v. *Forssenius*, 380 U. S. 528 (1965).[71]

Pennsylvania's further concern about prevention of fraud, while a legitimate state concern, is specious.[72] Claim-

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[69] The number of persons denied each year for lack of residence has been constant. App. p. 83a.

[70] The State of Iowa in its amicus brief cites "long range planning for appropriations" every two years as the basis for its one year and five year residence requirements. (Brief, pp. 2, 9.) Nonetheless it notes that its "projected budgets . . . are based upon past caseload experience" (p. 2).

[71] "[C]onstitutional deprivation may not be justified by some remote administrative benefit to the state." 380 U. S. at 542.

[72] Any fraud engaged in to evade the residence requirement is not a reason for the requirement itself.

ants are investigated, rather extensively in fact, but the Federal regulations and state provisions now deem thirty days the sufficient and maximum time to ascertain the bona fides of a claim.[73] Pennsylvania's view that those who have come from another state require a year's investigation to prevent fraud is simply not credible. Pennsylvania also fears that some people will receive benefits from two states. Plainly residence requirements hardly provide a safeguard against this speculative and unlikely occurrence.

[73] United States Department of Health, Education and Welfare, *Handbook of Public Assistance Administration*, Part IV, Sec. 2200(b)(3). The Connecticut Welfare Commissioner explicitly denied needing the period for such a purpose. *Thompson* v. *Shapiro*, 270 F. Supp. at 338 (D. Conn., 1967). Note also that voting eligibility has been based traditionally on certification, whereas welfare departments have extensive investigatory staffs and traditions.

CONCLUSION

The Court should affirm that restrictions on eligibility for public assistance based upon the length of the claimant's residence within the state are a denial of the equal protection of the laws.

Respectfully submitted,

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APPENDIX A

Historical Roots and Development of Residency Requirements

Statutory attempts to restrict the movement of the working man and others have been present in our Anglo-Saxon legal system since the Fourteenth Century. In order to cope with the increased mobility and concomitant economic insecurity resulting from the decline of the rural feudal system and the growth of the towns,[1] Parliament provided that no worker was to go "out of the town where he dwelleth in the winter, to serve in the summer, . . ."[2] Those who left their jobs "without reasonable cause . . . before the time agreed," were to be imprisoned.[3] These acts also forbade the giving of alms to the able-bodied (employable) poor, and only by implication permitted the disabled to beg.

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[1] Severe famine from 1315 to 1321 reduced the supply of labor; the increase of woolen manufacture began to draw people from the country to the cities; and the Black Plague of 1348-49, which wiped out about a third of the population, further swelled the demand for workers. The fact that the demise of feudalism was taking place at a time when the supply of labor was critically low gave workers the freedom to choose for whom they wished to work and where, as well as the right to bargain for the highest wages. This created a social dilemma to which Poor Law legislation attempted to control for centuries to come.

Accompanying this expansion of work opportunity and movement was an economic insecurity unknown to the serf. Where the serf, in times of economic strife, had been protected and maintained by the feudal lord, the newly emerging pauper had to look for help to the parish, the Church, or his own illegal devices. The landowner experiencing difficulty in obtaining labor had a desire for greater control over his workers.

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[2] 25 Edward III, c. 7 (1351) Second Statute of Laborers.

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Statutes required unemployed men and women to serve any employer who sought their labor, upon punishment of imprisonment.

A few years later mobility was totally restricted by an act providing that ". . . no laborer . . . shall depart at the end of his term . . . to serve or dwell elsewhere . . . unless he brings a letter [under the king's seal]."[4] Workers were apparently being drawn to the cities by the high wages being offered, and the 1388 law attempted to prevent all travel. This act explicitly distinguished between "beggars able to labor" and "beggars impotent to labor," requiring the latter to remain for the rest of their lives in the place where they were born or were then resident. No further provision was made for the impotent.

Further legislation followed. Disabled beggars were licensed and permitted to solicit alms only in an assigned area in the place where they were born or where they had resided for the three previous years; again, no further provision was made for them. Pregnant women, the extremely ill, and the aged were exempted from the severe penalties inflicted on other unemployed and non-resident.[5]

The preamble to the latter statute noted that "In all areas of the realm, vagabonds and beggars are on the increase and are the mother and root of all vices, including theft and murder." The able-bodied were to be set to forced labor.[6] As the numbers of unemployed increased, attempts to repress begging led to an act requiring "idle wanderers" to be branded and placed in slavery.[7] A further act contained the first provision for removal of the poor who did not

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[4] 12 Richard III. c. 3 (1388).

[5] 19 Henry VII c. 12 (1503); 22 Henry VIII c. 12 (1530-31).

[6] 27 Henry VIII c. 25 (1535-36).

[7] 1 Edward VI c. 3 (1547).

"belong" to the parish,[8] a provision then confined to such of the impotent poor as were actualy beggars.[9] A statute passed in 1572 provides that *any* "aged, lame or impotent person" with less than three years' residence could be sent from the parish, whether or not he was seeking relief or alms.[10]

Voluntary charity and "gentle exhortations" to induce people to contribute to the poor fund had failed, and compulsory local taxation was instituted in 1562.[11] This obligation led to exclusion of strangers, and "harboring" or entertaining outsiders was often not permitted. The newcomer sometimes was required to post a bond to indemnify the parish against his indigency.

In the statutes of 1597 and 1601, which form the basis of the Elizabethan Poor Law, parts of many previous acts were brought together.[12] The relief of destitution was defined as a public duty, and certain categories of the poor were to be provided for at public expense. Of the many parts of this law, none mentioned or authorized removal of the poor to the parishes where they "belonged," although we are told that removal was practiced without legislative authority.[13] These various and severe restrictions on mobility culminated in the Settlement Act of 1662.[14]

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[8] 3 and 4 Edward VI c. 16 (1549-50).

[9] Sidney Webb and Beatrice Webb, *English Local Government: English Poor Law History: Part I. The Old Poor Law.* London: Longmans, Green & Co., 1927, p. 318.

[10] 14 Elizabeth c. 5 (1572).

[11] Elizabeth c. 3 (1562-63). See George Nicholls, *A History of the English Poor Law* (2 Vols. 1854). London, P. S. King and Son, 1904, Vol. I, p. 152.

[12] 39 Elizabeth c. 3 (1597-98), and 43 Elizabeth c. 2 (1601).

[13] Webb and Webb, *op. cit.*, p. 319.

[14] Nicholls, *op. cit.*, pp. 279ff.

The 1662 Act[15] was largely passed in response to the metropolitan members of Parliament, who wanted to prevent the poor from coming to the city.[16] The act provided that any newcomer to a parish could be returned within 40 days to the parish where he was last legally settled, whether or not he applied for relief or was likely to do so. To avoid such expulsion, the individual could provide security or pay an exorbitant rent (£10), far beyond the ability of most (90%) of the population. The result was the legal restriction of all people without substantial wealth or property to the narrow area in which they were born.[17] This Act was the prototype for subsequent English and American Poor Law.

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[15] 13 & 14 Charles II c. 12 (1662). The exact wording of this brief, contradictory and carelessly written statute was later used in much early American legislation.

[16] Nicholls, *op. cit.*, Vol. I, pp. 279-87; Frederick M. Eden, *The State of the Poor: Or an History of the Laboring Classes in England* (3 Vols.). London: J. Davis, 1797, Vol. I, pp. 173-181, and Webb, *op. cit.*, Vol. I, pp. 324-26, all discuss the origin of this important law. Probably the best source is George Goode, *Report on the Law of Settlement and Removal*, addressed to the Poor Law Board in 1851, and published as Parliamentary Papers (H. C. 675 of 1851 and H. C. 493 of 1854). Other factors which may have led to its adoption were concern over increasing numbers of destitute in the overgrown metropolis of London, fear that the vagrant would bring disease or set fire to crowded wooden structures, apprehension that poor were getting beyond control. Dorothy Marshall. *The English Poor in the Eighteenth Century*, London: George Rutledge, 1926. See esp. chaps. V & VI. See also Stefan A. Riesenfeld, *The Formative Era of American Public Assistance Law*, 43 Calif. L. Rev. 175 (1955).

[17] Constant litigation arose as the various jurisdictions fought to determine who "belonged" or was a legal resident of their locality:

> "This single clause of a short act of Parliament has occasioned more doubts and difficulties in Westminster-hall, and has perhaps been more profitable to the profession of the law than any other point in English jurisprudence."

Eden, *op. cit.*, pp. 175-177.

The English principle of public responsibility for the local indigent was brought to North America by the British settlers and took root. Towns were closely knit, independent, insular and isolated.[18] Hardly off the boat, the people of Charlestown settlement in Massachusetts determined in 1634 "that none be permitted to . . . dwell in this town without the consent of the town first obtained." [19]

Each inhabitant was expected to be a landowner, and newcomers were frequently given land. Massachusetts passed a law in 1637 ordering that no land could be granted to a newcomer unless he was accepted by two magistrates. By 1650 it was ordered that all strangers "of whatever quality soever" be brought before the magistrates to explain their business in town.[20] The following year New Plymouth declared that a would-be settler needed the permission of the governor or two of his assistants, and later a license from the constable (1638) and appearance before the court (1650) were added. Within a few years other towns had similar and related laws.[21]

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[18] "This principle of local responsibility apparently arose out of and fitted admirably with the Anglo-Saxon spirit of independence. It was entirely in keeping with the social and economic self-sufficiency of the 'horse-and-buggy age' for local tax funds to be spent to relieve the local poor, under the control of local government in communities where everybody knew everybody else."

Josephine C. Brown, *Public Relief, 1929-1939* (Henry Holt & Co., New York, 1940) p. 6.

[19] Josiah H. Benton, *Warning Out in New England 1656-1817.* (Boston: W. B. Clarke Co., 1911), p. 29. Even John Harvard, whose vast fortune later launched Harvard University, required the permission of the town to settle in Charlestown. *Ibid.*

[20] *Ibid.*, pp. 46-47.

[21] *Ibid.*, pp. 88 and 99.

For example, no inhabitant of a town was permitted to sell or rent his private property to a newcomer without the consent of the town council. Governor John Winthrop wanted to rent his house in New Haven, but was forced to sell it to the town. No member of the town was permitted "to receive or entertain persons who were not inhabitants." Even adult children from other towns could not visit with their parents without permission. Regardless of the circumstances, fines were levied for violation of these rules.[22] If an outsider was admitted, he had to have security.[23]

The Seventeenth Century also saw the development of "warning out" laws in New England and, later elsewhere, by which all newcomers who might become chargeable were to leave the local town.[24] In practice many people did not leave but never acquired a legal settlement and therefore were ineligible for aid.

Toward the end of the seventeenth century and throughout the eighteenth century, the population increased in size and mobility. It became more and more difficult to prevent movement, and more rigorous devices were believed necessary to determine who would be eligible for relief.

The first general poor laws in the colonies, enacted at the close of the eighteenth century, dealt with the problems of settlement and residence, in much the same manner as their predecessors.[25] But from the beginning these statutes

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[22] *Ibid.*, pp. 29-30 and 85-87.

[23] For example: "Richard Way is admitted into the Town, provided that Aron Way become bound in the sum of twenty pound sterling to free the town from any charge that may accrue to the two by said Richard or his family." *Ibid.*, p. 24.

[24] Plymouth, Massachusetts adopted the first such law in 1671. *Ibid.*, p. 54.

[25] See generally Riesenfeld, *op. cit.*, pp. 201ff.

lacked the uniformity that was the key to the English system of relief. In the more complex American laws, each jurisdiction could define the period necessary to gain settlement. As now, legal settlement could be lost in one jurisdiction prior to being gained in another.

The Ohio Territorial Law of 1795 formed the basis for Poor Law administration throughout the sparsely populated but enormous Northwest Territory.[26] The statute was copied from the Pennsylvania Poor Law, which itself was adapted from Elizabethan Poor Law.[27] There was extraordinary similarity in wording and intent between the 1662 Law of Settlement, set forth above, and the Ohio Territorial Law of 1795:

> "Upon complaint being made by the overseers of the poor . . . any two justices . . . [may] by their warrant or order . . . remove and convey such person, or persons, to the country, township, place or state, where he, she or they was or were last legally settled, unless such person or persons shall give sufficient security to discharge and indemnify the said township.[28]

Elizabethan philosophical and administrative concepts were indelibly impressed upon nearly all of the country, except Louisiana.[29]

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[26] Ralph Pumphrey and Muriel Pumphrey, eds., *The Heritage of American Social Work* (New York, Columbia University Press, 1961), p. 55.

[27] Aileen E. Kennedy, *The Ohio Poor Law and Its Administration* (Chicago, University of Chicago Press, 1934), pp. 12-14.

[28] Solomon P. Chase, ed., *The Statutes of Ohio and the Northwestern Territory* (Cincinnati, Corey and Fairbanks, 1833), Vol. I, pp. 175-182; Pumphrey and Pumphrey, *op. cit.*, p. 55.

[29] Pumphrey and Pumphrey, *op. cit.*, p. 57.

Although there was some variation from state to state, means of gaining legal settlement were patterned after English law. A man who had paid taxes for one or two years, paid a yearly rental of not less than $25.00, had lived for a year on his own property, or held public office acquired a legal settlement and became eligible for relief.[20]

The laws of settlement remained largely unchanged into the Twentieth Century,[21] despite the continuing opposition of persons working in the field of social welfare.[22] The Social Security Act of 1935, as amended, effected a substantial reduction of the period of residence required in many states and changed the emphasis from settlement to residence for the categorical programs.[23]

A number of means of mitigating the harsh effects of the residence requirements have been attempted, which are an-

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[20] Kennedy, *op. cit.*, p. 16. The Poor Law history of various state or territory cite similar or identical ways of gaining settlement. The area mainly lacking in uniformity was the time required to gain or lose settlement.

[21] See, e.g., Comment, *The Michigan Settlement and Removal Laws in an Historical Perspective*, 45 J. Urban Law 130 (1967). Serious problems arose as the result of "waves of immigration" from Europe and the concomitant increase of the rolls. New York Governor's Commission on Unemployment Relief, *Public Relief for Transient and Non-settled Persons in the State of New York: A Study of the Nature and Administration of the Care Extended Destitute Persons Not Having a Legal Settlement in the Community Where They Receive Aid* (1936), pp. 38-45, 93-97, cited in *Abbott, op. cit.* at p. 214.

[22] See, e.g., Edith Abbott, *Public Assistance* (Chicago, University of Chicago Press, 1940), Vol. I, pp. 180ff.

[23] The residence requirements for state aid to dependent children in 1934 ranged up to 5 years, and exceeded one year in 20 states. Social Security Board, *Social Security in America* (1937), pp. 235-236. Of the 28 states with old age pensions, 27 had residence requirements of 10 to 35 years. *Congressional Record*, April 13, 1935, p. 5602.

alogous to the "most favored nation" treatment of commodities in international trade. Some statutes provide for waiver of residency if the state from which the person came has no residence requirement,[34] and many states have entered into agreements having the same effect. A review of the manuals (department regulations) of many of the states reveals that two-party reciprocal agreements have been entered into by at least 24 states and territories with some of the other states and territories with regard to aid in one or more of the programs in each case.[35] Interstate compacts have been little used.[36]

In addition to the residence requirements a number of other statutes typical of the early English and American poor law have persisted on our statute books well into the twentieth century and in more than one instance up to the present time. Officials in Iowa may now obtain a court order requiring a person not receiving assistance but likely to become a charge to leave the county or state. Enforcement is by contempt proceedings or physical removal by the sheriff.[37] Intra-state removal may be compelled without any judicial proceedings whatever in Minnesota;

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[34] See note 17 of this Brief.

[35] Alaska, Connecticut, Delaware, Georgia, Guam, Hawaii, Idaho, Maine, Michigan, Minnesota, Mississippi, New Hampshire, New Jersey, New York, North Dakota, Pennsylvania, Puerto Rico, Rhode Island, South Carolina, South Dakota, Utah, Vermont, Virgin Islands and Wisconsin.

[36] See, e.g., Council of State Governments, *Interstate Welfare Compact for 1960.*

[37] Iowa Code Ann. §252.18 (1954). During 6 months in 1946, 35 persons were removed by Iowa, 20 to other states. Daniel R. Mandelker, *Exclusion and Removal Legislation,* 1956 Wisc. L. Rev. 57, 67, n. 37. One Michigan county spent $28,000 on removal in 1965. Comment, *The Michigan Settlement and Removal Laws in an Historical Perspective,* 45 J. Urban Law 130, 175 (1967).

the chairman of the county welfare board need merely serve an order on the sheriff.[38] Similar statutes may well be on the books of other states.[39] Officials "have often engaged in the practice of dumping or passing on nonresidents who apply for aid, in the hope that the next community will accept responsibility for their care."[40] Other familiar statutes from Elizabethan times such as penalties for aiding travel of indigents[41] and "warning out"[42] still exist or have recently been repealed.

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[38] Minn. Stat. Ann. §262.11 (1959).

[39] Connecticut repealed its compulsory interstate removal statute (Conn. Gen. Stat. §17-273a, repealed by 1963 Pub. Act 501, §4) only one year after it had been held constitutional by the Supreme Court of that state. *State* v. *Doe*, 149 Conn. 216, 178 A. 2d 271 (1962). One author noted in 1956 that "compulsory removal laws are still present in many states today and have not fallen entirely into disuse." Mandelker, *op. cit.*, at pp. 58-59.

[40] Mandelker, *op. cit.*, at p. 59.

[41] See, e.g., Wisc. Stat. Ann. Sec. 49.12(4) (1957).

[42] See, e.g., Iowa Code §§252.20 and 252.21, Repealed Act 1959 (58 G. A.) Ch. 181, §2. That statute actually provided for substituted service if the person could not be found. Similar laws may be in existence in other states.

APPENDIX B

Public Assistance Durational Residency Cases Now Pending[1]

1. ARIZONA:

Porter v. *Graham*, No. Civ.-2348-TUC, D. Ariz.

Plaintiff challenges the "5 of 9"[2] year requirement for OAA aid. She, a widow, aged seventy-four, lived in Arizona for three and one-half years before applying for assistance. Prior to coming to Arizona, she was a resident of Mississippi.

2. CALIFORNIA:

Marshall v. *California Dept. of Social Welfare*, Civil Action No. 47401, N. D. Calif.

Plaintiff challenges the one-year residency requirement for AFDC aid. Plaintiff was born in Louisiana, resided for a year in California, with her brother, and returned to California to marry and establish a permanent home.

3. CONNECTICUT:

A. *Alvarado* v. *Dunn*, Civil Action No. 12,399, D. Conn.

Plaintiff challenges the one-year residency requirement for G. A. aid. Plaintiff, a married woman, age 26 years,

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[1] Almost all of the cases listed are class actions, and many challenge the residence requirements for all public assistance programs. This outline, however, will only set forth the requirement in the program directly at issue in the case.

[2] As used in this Appendix, "5 of 9" refers to a requirement that a welfare recipient have resided five within the nine years, and continuously for not less than one year immediately preceding the date of application for assistance.

came to Connecticut to be near relatives and to receive better medical assistance. She suffers from physical and nervous disorders.

B. *Thompson* v. *Shapiro*

3. COLORADO:

A. *Barksdale* v. *Birkins*, Civ. Action No. 68-C-731, D. Colo.

Plaintiff, who came to Colorado from North Carolina with her two minor children, challenges the one-year requirement for AFDC aid.

B. *Baxter* v. *Birkins*, Civ. Action No. 67-C-541, D. Colo.

Plaintiff also challenges the one-year requirement for AFDC aid. She is a resident alien, residing in Colorado since July 28, 1967, with her three minor children, two of whom are citizens of the United States.

4. DELAWARE:

Green v. *Dept. of Public Welfare of the State of Delaware*, 270 F. Supp. 173 (D. Del. 1967).

Plaintiffs challenge the one-year requirement for AFDC aid. Plaintiffs and their eight children came to Delaware from South Carolina to seek better employment. Mr. Green is employed as a construction worker, but averages less than $40 per week.

5. District of Columbia:

A. *Harrell* v. *Tobriner*

B. *Barley* v. *Tobriner*

C. *Legrant* v. *Tobriner*

D. *Brown* v. *Tobriner*

6. Florida:

Lamont v. *Roberts,* Civil Action No. 67-1056-Civ.-CA, S. D. Fla.

Plaintiff challenges the "5 of 9" requirement for ATPD aid. Plaintiff, a 61-year old resident of Florida since November, 1964, came to Florida for reasons of health.

7. Illinois:

A. *Johnson* v. *Robinson,* —— F. Supp. —— (N. D. Ill., Feb. 20, 1968).

Plaintiff, a returning resident, challenges the one-year residency requirement for AFDC aid. She had been abandoned by her husband and she and her child joined her aunt and uncle in Chicago. She had worked but is now unable to due to the advanced state of her pregnancy.

B. *Brewer* v. *Robinson,* —— F. Supp. —— (N. D. Ill., Feb. 20, 1968).

Plaintiff, a returning resident, challenges the "5 of 9" year residency requirement for OAA aid. She lived in Illinois for 44 years and, when her husband died, joined her daughter and son-in-law in California in 1965. Plaintiff returned to Illinois with her daughter and son-in-law in 1967.

8. IOWA:

Sheard v. *Dept. of Social Welfare,* Civ. Action No. 67-C-521-EC, N. D. Iowa.

Plaintiff challenges the "5 of 9" year requirement for OAA aid. Plaintiff is seventy-two years old. Plaintiff's husband died in January 1966. In April 1966 plaintiff left her native Mississippi to live with her brother in Iowa. The State of Mississippi has terminated her OAA aid because she has become a resident of Iowa.

9. MARYLAND:

Mantell v. *Dandridge,* Civ. Action No. 18792, D. Md., Dec. 4, 1967.

Plaintiff, a returning resident, challenges the one-year residency requirement for AFDC aid. Plaintiff was a resident of Maryland for twenty-three years. She was married and moved to New Jersey in 1964. Plaintiff returned to Maryland in June 1967 as a result of physical abuse on the part of her husband. Plaintiff has five minor children, all born in Maryland.

10. MASSACHUSETTS:

A. *Robertson* v. *Ott,* Civ. Action No. 68-211-6, D. Mass.

Plaintiff, a returning resident, challenges the one-year requirement for AFDC aid. Plaintiff was a resident of Massachusetts for the first nineteen years of her life. She moved to Indiana in 19[illegible] and returned to Massachusetts in Oct. 1967 after losing all her assets in a fire and being deserted by her husband. Plaintiff worked as a typist from Oct. 1966 to Jan. 1967 but was forced to quit due to poor

health. She now receives $21 per week from general assistance.

B. *Pearson* v. *Ott,* Civ. Action No. 68-211-6, D. Mass.

Plaintiff, a returning resident, challenges the one-year residency requirement for ADC aid. Plaintiff lived in Massachusetts from 1960-65. She returned to Massachusetts in 1968 to be with her parents because her husband abused her physically. Plaintiff has been forced to place her two minor children in a foster home until she can afford to care for them.

C. *Anderson* v. *Ott,* Civil Action No. 68-211-6, D. Mass.

Plaintiff, a returning resident, challenges the one-year requirement for AFDC aid. Plaintiff lived in Massachusets until she was twenty-two years old, and returned to Massachusetts to be with her parents as a result of marital difficulties in Nov. 1967.

11. MICHIGAN:

Weidner v. *Houston,* Civil Action No. 5700, N. D. Mich.

Plaintiff, a returning resident, challenges the one-year residency requirement for AFDC aid. Plaintiff had lived in Michigan prior to 1960 and returned to Michigan in 1966 after being divorced from her husband. Both of plaintiff's minor children were born in Michigan. Plaintiff applied for aid on April 13, 1967 and was told on that date that the only aid she could receive was emergency groceries and transportation back to Indiana.

12. MINNESOTA:

Wallace v. *Hursh,* Civil Action No. 467-Civ.-327, D. Minn.

Plaintiff challenges the one-year residency requirement for AFDC aid. Mrs. Wallace came to Minnesota in November, 1965 to be near her aunt and for health reasons.

13. MISSOURI:

Northway v. *Carter,* Civil Action No. 67-C292(2), E. D. Mo.

Plaintiff challenges the one-year residency requirement for AFDC aid. Plaintiff is a child, age 10, whose mother is deceased and father is in prison. She is living with her grandmother and receives no other support.

14. OHIO:

King v. *Dept. of Public Welfare,* Civil Action No. C-67-915, N.D. Ohio.

Plaintiff, a returning resident, challenges the one-year residency requirement for AFDC aid. Plaintiff resided in Cleveland, Ohio from 1958-9. In 1959 she met her husband and they moved to Erie, Pennsylvania to find work and be married. She resided intermittently in Ohio and Pennsylvania until 1967, when she settled in Ohio with her children after her husband had been imprisoned.

15. OREGON:

A. *Cooley* v. *Juras,* Civil Action No. 67-662, D. Ore.

Plaintiff, a returning resident, challenges the one-year residency requirement for AFDC aid. Plaintiff is twenty-

one years of age and has five children. She lived in Oregon with her father from age seven to fourteen, and returned to Oregon to be near her relatives and for her husband to find work. Her husband, however, deserted her and left the state of Oregon. Plaintiff has sought legal aid to gain support from her husband.

B. *Huff* v. *Juras,* Civil Action No. 67-662, D. Ore.

Plaintiff challenges the one-year residency requirement for AFDC aid. She came to Oregon, where her family resides, from California with her children after her husband was sentenced to prison.

C. *Moore* v. *Juras,* Civil Action No. 67-662, D. Ore.

Plaintiff, a returning resident, challenges the one-year residency requirement for AFDC aid. She lived in Oregon from 1951-1954, divided her home between Oregon and California between 1954-1962, and lived in California from 1962-1967. Three of her children were born in Oregon and her only living relative resides in Oregon. In August, 1967, she returned to Oregon to be near relatives and to escape the violence of her husband.

16. PENNSYLVANIA:

A. *Smith* v. *Reynolds*

B. *Waggoner* v. *Rosenn,* Civil Action No. 9841, M. D. Pa., Jan. 29, 1968.

Plaintiff, the mother of seven children, challenges the one-year residency requirement for AFDC aid. Plaintiff is presently employed as a nurse's aid. She would be entitled to $75 per month in supplementary aid. Plaintiff came to Pennsylvania in July, 1966 from California.

17. SOUTH CAROLINA:

Charles v. *Rivers*, Civil Action No. 67-849, D. S. Car.

Plaintiff, a returning resident, challenges the one-year residence requirement for AFDC aid. She was a resident of South Carolina until her marriage in 1966 whereupon she moved to Ohio. She returned to South Carolina after marital difficulties in 1967. Plaintiff has one child and is pregnant with another.

18. TEXAS:

A. *Alvarez* v. *Hackney*, Civil Action No. 68-18-SM, W. D. Tex.

Plaintiff, a returning resident, challenges the one-year residence requirement for AFDC aid. Plaintiff lived in San Antonio, Texas continuously until 1954 when her husband entered the Marine Corps. Upon discharge from service, she, her husband, and children returned to San Antonio, but moved ten years later to New Orleans, Louisiana where her husband had work. In August 1967, plaintiff returned to San Antonio to care for her sick mother.

B. *Suggs* v. *Parkland Memorial Hospital*, Civil Action No. 3-2486-B, N. D. Tex.

Plaintiff challenges the one-year* residence requirement for prenatal care aid. Plaintiff, her husband, and parents came to Texas from Tennessee to seek employment. Plaintiff is pregnant and has been refused prenatal care.

19. WASHINGTON:

A. *Martinez* v. *Washington State Dept. of Public Assistance*, Civil Action No. 7455, W. D. Wash.

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* One year in Texas and six months in Dallas County.

Plaintiff, a returning resident, challenges the one-year residence requirement for AFDC aid. The mother of seven minor children, she lived in Washington from 1942-1966. In 1966 plaintiff moved to California where her husband obtained work, and in August, 1967 returned to Washington where her husband was seeking work with the Boeing Company. Plaintiff's husband deserted his family in Seattle in September, 1967. Plaintiff has sought legal aid to seek support from her husband, but has so far not met with success.

B. *King* v. *Washington State Dept. of Public Assistance,* Civil Action No. 7455, W. D. Wash.

Plaintiff challenges the one-year residence requirement for AFDC aid. Plaintiff is the mother of seven children. She had resided in several states in recent years because her husband was in the military. From 1965 thru June, 1967 her husband was stationed in Oakland, California. In July, 1967, plaintiff moved to Seattle because her husband was to be transferred there. Plaintiff's husband returned to California to remove family belongings to Seattle, but has never returned.

C. *Orvale* v. *Washington State Department of Public Assistance,* Civil Action No. 7455, W. D. Wash.

Plaintiff challenges the "3 of 4" year residence requirement for general assistance aid. Plaintiff has resided in Washington since April 1, 1965. She had worked as a maid and kitchen helper in nursing homes since her husband's death in 1958, but is now medically unfit to work.

20. WISCONSIN:

A. *Ramos* v. *Health and Social Services Bd.*, 276 F. Supp. 474 (E. D. Wisc. 1967).

Plaintiff, a returning resident, challenges the one-year residence requirement for AFDC aid. She was born in Wisconsin in 1935 and resided there until 1957, when she married and moved to Chicago. Plaintiff was deserted by her husband in June, 1967, and returned with her five children to Wisconsin to be near her family. Plaintiff was granted temporary assistance of $177 and advised that she could obtain further assistance only by returning to Chicago.

B. *Denny* v. *Health & Social Services Bd. of the State of Wisconsin*, Civil Action No. 67-C-426, E. D. Wis.

Plaintiff, a returning resident, challenges the one-year residence requirement for General Assistance Aid. Born in Wisconsin in 1929 and residing there until marriage in 1965, she and her husband moved to Illinois. Her husband left her in January, 1966 and she returned to Wisconsin in March 1967.

C. *De Cardenas* v. *Health & Social Services Bd.*, Civil Action No. 67-C-426, E. D. Wis.

Plaintiff, a returning resident, challenges the one-year residence requirement for General Assistance Aid. She and her mother moved to Wisconsin in 1956 where she worked as a practical nurse in Milwaukee until 1958 when she was injured during the course of her employment. She has been unable to work since and has undergone three surgical operations as a result of her injury. In January, 1967, she returned to Milwaukee.

SUPREME COURT, U. S.

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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 9

BERNARD SHAPIRO, Commissioner of Welfare of the State of Connecticut,

Appellant,

—v.—

VIVIAN MARIE THOMPSON,

Appellee.

BRIEF OF AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA, AND CONNECTICUT CIVIL LIBERTIES UNION, *AMICI CURIAE*

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 813

BERNARD SHAPIRO, Commissioner of Welfare of the State of Connecticut,

Appellant,

—v.—

VIVIAN MARIE THOMPSON,

Appellee.

BRIEF OF AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA, AND CONNECTICUT CIVIL LIBERTIES UNION, *AMICI CURIAE*

Interest of *Amici*

The American Civil Liberties Union, and its Southern California and Connecticut affiliates, file this brief, with consent of the parties, because we believe that laws which prohibit receipt of state benefits, otherwise generally available, on the basis of length of residency within the state, deny the equal protection of the laws, violate the Commerce Clause, and impair the right to travel. Though the brief is nominally confined to examination of the Connecticut statute involved in No. 813, its argument bears directly on *Washington* v. *Harrell*, No. 1134, and *Reynolds* v. *Smith*, No. 1138, and we ask the Court to consider the brief in relation to those cases as well.

Statement of the Case

This action was brought in the United States District Court for the District of Connecticut under Title 28, United States Code, sections 2281 and 2284. Appellee sought a declaration that Chapter 299, section 17-2d, of the Connecticut General Statutes violates the Constitution of the United States, and requested an injunction against the enforcement of the statute, and payment of moneys unconstitutionally withheld. The action was heard by a three-judge district court.

The court found the facts as stipulated to by the parties. In June, 1966, appellee moved from Boston, Massachusetts, to Hartford, Connecticut. Her purpose in moving was to live near her mother. As the mother of one child, she had been receiving Aid to Dependent Children (ADC) from the City of Boston. Boston discontinued this aid in September because of appellee's change of residence. When she applied for similar assistance to appellant, Commissioner of Welfare of the State of Connecticut, he denied ADC to her on November 1, 1966, because although she was otherwise eligible she had not resided in Connecticut for one year prior to her application. The one-year residence requirement is stated in Conn. Gen. Stat. section 17-2d:

> When any person comes into this state without visible means of support for the immediate future and applies for aid to dependent children under chapter 301 or general assistance under part 1 of chapter 308 within one year from his arrival, such person shall be eligible only for temporary aid or care until arrangements are made for his return, provided ineligibility for aid to dependent children shall not continue beyond the maximum federal residence requirement.

The Social Security Act prohibits all federal financial assistance to state plans for aid to needy families with children if such plans impose residence requirements in excess of the federally prescribed limits.[1] (There is no contention herein that Connecticut's residence requirements are in excess of the federal limits.)

The Welfare Department of the State of Connecticut has promulgated regulations construing the term "person . . . without visible means of support for the immediate future" contained in section 17-2d:

> 1. Persons or families who arrive in Connecticut without specific employment.
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> 2. Those arriving without regular income or resources sufficient to enable the family to be self-supporting in accordance with Standards of Public Assistance.
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> 3. "Immediate future" means within three months after arriving in Connecticut.

Connecticut Welfare Manual, Vol. 1, Ch. 2, section 219.1.

The regulations further provide:

> 1. If the application for assistance is filed within one year after arrival in Connecticut, the applicant must establish that he was self-supporting upon arrival and for the succeeding three months thereafter; or
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> 2. If the application for assistance is filed within one year after arrival in Connecticut, the applicant must clearly establish that he came to Connecticut with a bona fide job offer; or

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[1] 42 U. S. C. §602(b).

3. If the application for assistance is filed within one year after arrival in Connecticut, the applicant must establish that he sought employment and had sufficient resources to sustain his family for the period during which a person with his skill would normally be without employment while actively seeking work. Personal resources to sustain his family for a period of three months is considered sufficient. Those who come to Connecticut for seasonal employment such as work in tobacco or short term farming are not deemed to have moved with the intent of establishing residence in Connecticut.

Connecticut Welfare Manual, Vol. 1, Ch. 2, section 219.2.

Under these statutes and regulations, Connecticut withholds ADC for one year to newly arrived residents unless they come to Connecticut with substantial employment prospects, or enough resources to sustain the family, or began their journey from a state having a reciprocal interest compact act for welfare services (Conn. Gen. Stat. section 17-21a, *et seq.*, discussed *infra*). Plaintiff came to Connecticut with neither the prospect of employment nor the necessary resources, and she did not come from a state having an interstate compact statute for welfare services.

These exceptions to Connecticut's residence restrictions ("self-supporting," "bona fide job offer," "personal resources") invert the usual criteria for determining the need for assistance. The normal ground for assistance is the lack of independent means of sustenance. See Conn. Gen. Stat. section 17-2 and 42 U. S. C. section 601 (Social Security Act).

ARGUMENT

I.

Appellant's withholding of aid to appellee denies her the equal protection of the laws.

A. *The Discriminatory Classifications:*

The Connecticut welfare statutes and regulations under consideration establish two classes of residents (among those otherwise qualified for aid): (1) those who have resided in Connecticut for over one year; and (2) those who have not. The latter class is further subdivided into: (a) those who have migrated from states having a reciprocal interstate compact statute for welfare services, as does Connecticut (Conn. Gen. Stat. section 17-21a, *et seq.;* see discussion *infra*); (b) those who are sufficiently self-supporting under the above-quoted statute (section 17-2d) and regulations; and (c) all others. Welfare benefits are given to all classes except that subclass last named.

Connecticut, in dispensing welfare services thus discriminates between residents on the basis of (1) their length of residence; and (2) if they have been residents for less than a year, on the basis of (a) what their immediately preceding state of residence was, and (b) whether they have the capacity to be self-supporting (the existence of such capacity being a basis for *giving* aid, rather than *withholding* it). Each criterion of discrimination is without rational justification, inflicts unfair costs and penalties upon persons requiring assistance, and conflicts with the national goal of maintaining, in the large free trade area formed by the several states, the residential mobility necessary for economic growth and full employment.

B. *The Governing Standards of Equal Protection:*

Although neither the common law nor the state or federal constitutions have thus far been held to require a state to provide welfare benefits, if the state chooses to provide such benefits it cannot arbitrarily withhold them from certain classes of people. *Sherbert* v. *Verner*, 374 U. S. 398 (1963) (statute denying state unemployment compensation benefits to Seventh Day Adventist unable to find work because her religion prevented working on Saturday held unconstitutional); see also *Speiser* v. *Randall*, 357 U. S. 513 (1958).

Although a state legislature is free to make classifications in the application of a statute this Court has left no doubt that the classification must rest "upon some difference which bears a reasonable and just relation to the Act in respect to which the classification is proposed, and can never be made arbitrarily and without such basis." *Gulf, Colorado and Santa Fe Railway Co.* v. *Ellis*, 165 U. S. 150, 155 (1896). "[A] statutory discrimination must be based on differences that are reasonably related to the purposes of the Act in which it is found." *Morey* v. *Doud*, 354 U. S. 457, 465 (1956). And in applying this test to state action under the equal protection clause, the adverse economic and social impact of that action is to be measured and appraised. See *Brown* v. *Board of Education*, 347 U. S. 483, 492-94 (1954).

C. *The Connecticut ADC Residence Requirements Bear No Reasonable Relation to the Goals of Connecticut's Welfare Legislation; and in Any Event the Purpose of These Requirements Are Constitutionally Impermissible:*

The Connecticut statutes and regulations under consideration impose a discrimination on Connecticut residents of less than one year which has no reasonable relation to the purposes of the legislation governing Aid to Dependent Children. This discrimination must be put to close scrutiny for two reasons: (1) the very lives of appellee's children are involved, for the ADC benefits denied herein are intended to provide subsistence; and (2) discrimination among residents of a state traditionally has been regarded with suspicion. See *Truax* v. *Raich,* 239 U. S. 33 (1915); *Oyama* v. *California,* 332 U. S. 633 (1948); *Carrington* v. *Rash,* 380 U. S. 89 (1965).

Two three-judge courts other than the court below have provided a thorough analysis of the possible purposes of the residence requirement. They concluded that the residence requirement has no reasonable purpose in welfare aid, and thereby denies to welfare applicants not meeting it the equal protection of the laws. In *Green* v. *Department of Public Welfare,* 270 F. Supp. 173, 178 (D. Del. 1967), the court held:

> We therefore conclude that the one-year residency requirement in 31 Del. C. §504, and other provisions of the Code relevant thereto, create an invidious distinction as to the class represented by plaintiffs and are therefore in violation of the equal protection clause.

Harrell v. *Tobriner,* Civil Action No. 1497-67 (D. D. C. 1967), also held that the District of Columbia one-year

residence requirement violates the Equal Protection Clause. In *Ramos* v. *Health and Social Services Board*, 276 F. Supp. 474 (E. D. Wis. 1967), and *Smith* v. *Reynolds*, Civ. Action No. 42419 (E. D. Penn. 1967), the courts issued preliminary injunctions on the ground that similar residence requirements were in violation of the equal protection clause. In *Mantell* v. *Dandridge*, —— F. Supp. —— (D. C. Md. Oct. 24, 1967), the court issued a temporary restraining order against the enforcement of a similar residence requirement in Maryland.

The purpose of the statutes and regulations under consideration obviously is to provide children without any means of financial support money payments to be used for the basic essentials of subsistence.[2] The corollary purpose of this kind of aid is to maintain and strengthen family life and to enable parents or relatives of the children to care for the children in a family environment as nearly normal as possible.[3] For people such as appellee who do

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[2] See Conn. Gen. Stat. §17-2:

> The welfare commissioner shall administer the law concerning state paupers, assistance for the aged, the blind and the permanently and totally disabled, and to dependent children and welfare of children *who require the care, protection or discipline of the state.* (Emphasis added.)

[3] *Cf.* 42 U. S. C. §601 (Social Security Act):

> For the purpose of encouraging the care of dependent children in their own homes or in the homes of relatives by enabling each State to furnish financial assistance and rehabilitation and other services, as far as practicable under the conditions in such State, to needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life and to help such parents or relatives to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection, there is authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this subchapter. . . .

not meet the residence requirement, this purpose is not realized. A resident of Connecticut for six months who is indigent and without means by which to support herself and her children is no less needy than an indigent who has resided in Connecticut for one year.[4] The denial of assistance for an entire year to otherwise qualified recipients only erodes the values which the program tries to promote. Withholding aid to needy children for one year may mean that when the aid is given it is too late to prevent the sundering of a family, too late to prevent malnutrition or exposure, too late to prevent a boy or girl from succumbing to crime.

The only possible purposes of the one-year residence requirement are: (1) to "protect the state treasury" by preventing an influx of people who migrate to Connecticut for the principal purpose of obtaining higher welfare benefits than they received in their former places of residence; (2) to prevent people who cannot support themselves from

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[4] *Cf.* Hyde [General Director, National Travelers Aid Associational], Foreword to *Residence Laws: Road Block to Human Welfare* (Symposium) 3 (1956) (quoting from Statement of Principles on Residence Laws, March 23, 1956, National Travelers Aid Association):

> Were residence laws merely a paper anachronism, there might be no harm in allowing them to remain on the books, as a kind of socio-legal curiosity. Unfortunately, their effect is not on paper but on people. Day in and day out, human beings are deprived of essential services and opportunities, not because they don't deserve them, but merely because of the accident of how long they happen to have lived in a particular place.
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> [A] person who has exercised the right of free movement should be on an equal footing with all others; . . . human needs such as food, clothing, shelter, and medical care should be met as such, regardless of whether the person in need is a long-established resident of the community, a newcomer to the community or in transit to some other place. . . .

coming (for whatever reason) to Connecticut; (3) to encourage recent arrivals who have become unable to support themselves to leave; (4) to provide an objective test to determine whether an applicant is a domiciliary; and (5) for administrative convenience and efficiency. Connecticut states frankly that the principal, if not sole, purpose of its one-year residence requirement is to protect its treasury by discouraging entry of those who come to Connecticut and are in need of welfare benefits.[5] *Thompson* v. *Shapiro*,

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[5] The Brief of the State of California as *Amicus Curiae on Behalf of Appellant*, claims that the purpose of California's residency requirement "is not as is Connecticuts' [sic] to prevent in-migration of indigents" (p. 5) in order to protect its fisc. In describing California's "different" purpose, the Brief then cites California Welfare and Institutions Code section 11004, which provides that the Code be administered "with due consideration for the needs of applicants and the safeguarding of public funds," and concludes that California's legislative purpose is proper, whatever the status of Connecticut's.

California's attempt to draw such a distinction in purpose is labored. Obviously, the only conceivable way in which California's residence requirement could "safeguard public funds" is either (a) to discourage in-migration or (b) simply not to pay new entrants who have nevertheless chosen to change their residence—*i.e.*, to preserve the treasury by restricting welfare funds to "insiders," and shutting out "outsiders." *Neither* purpose is constitutionally permissible. California's statement of purpose is thus simply a euphemism for "We will save money by excluding *strangers* from the benefits we dispense to the *in-group*," and that goal is essentially the same as that of Connecticut's residence test.

For California to state blandly in defense of residence tests that it is simply "protecting its budget" is thus to argue in a circle. It could protect its budget by withholding aid from minority groups while dispensing it to others; but no one gainsays the constitutional invalidity of such exclusions. We do not and cannot rationally dispute the proposition that California is trying to save money. But it cannot do so in violation of Constitutional standards, and whether there have been such violations is precisely the issue herein. *Amici* believe that to guard a state treasury by establishing arbitrary and

270 F. Supp. 331, 336-37 (D. Conn. 1967). This appears to include purposes (1) through (3).

Connecticut itself apparently believes not only that its residence requirement conflicts with the basic purposes of ADC (and indeed with the purposes of any welfare assistance) but that the supposed "justifications" for the requirement are without foundation, for in its *Interstate Compact on Welfare Services* (Conn. Gen. Stat. sections 17-21a, *et seq.*) it has (a) legislatively declared that restrictive residence requirements are "barriers" to virtually any kind of needed assistance and to migration (Art. I); and (b) enacted an *automatic* reciprocity agreement (Arts. III and VI) whereby *all* residence tests for *all* welfare services are abolished (without further legislative, executive or administrative action) for migrants from *any* and *all* states which have or enact similar welfare reciprocity laws:

INTERSTATE COMPACT ON WELFARE SERVICES

ARTICLE I

> The policy of the states party to this compact is to make welfare services available on a reciprocal basis under this compact and *to eliminate barriers caused by restrictive residence or settlement requirements of the several states*. . . . This compact shall be open for joinder by any state of the United States and the Dis-

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irrational distinctions among residents otherwise qualified for assistance violates the Fourteenth Amendment.

In any event, the *effects* of such residence requirements are either (a) to discourage in-migration directly or (b) to penalize it unfairly, thus burdening entrants who stay or forcing their removal (the latter being a direct attack on in-mobility). Since these effects are the reasonable and probable consequences of the residence test, California's disclaimer of evil intent may be ignored.

trict of Columbia.* (Conn. Gen. Stat. section 17-21a) (Emphasis added.)

Connecticut's complaint of a threat to its treasury is thus scarcely credible; it seems more likely that its residence test has no purpose, and is simply a holdover from less enlightened days of prejudice against outsiders. If and when all other U. S. jurisdictions enact a similar compact, Connecticut will in effect—without any further official action on its part—have no residence requirement for migrants from anywhere in the United States.

In any event, a state's purpose in seeking to protect its treasury by any of these three means is not a valid constitutional basis for discrimination. In *Edwards* v. *California*, 314 U. S. 160 (1941), a California statute making it a crime knowingly to bring an indigent into the state was declared unconstitutional, over objections by the State of California that extensive immigration was creating a substantial financial problem (opinion of the Court, 314

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* ARTICLE III

(a) No person who has removed himself from one party state to another party state shall be ineligible for a welfare service in such other party state because of failure to meet that state's residence or settlement requirements for eligibility. The cost of providing a welfare service to any person made eligible therefor by reason of this compact shall be charged within the state in accordance with the laws of such state. . . .

ARTICLE VI

(a) This compact shall enter into full force and effect as to any state when enacted by it into law and such state shall thereafter be a party thereto with any and all states legally joining therein. . . .

See also Conn. Gen. Stat. §§17-10, 32(g), 106; 1 Regulations of Connecticut State Agencies, §17-2d-2.

U. S. at 173). As Mr. Justice Jackson said in his concurring opinion (314 U. S. at 185):

> Any measure which would divide our citizenry on the basis of property into one class free to move from state to state, and another class that is poverty-bound to the place where he has suffered misfortune, is not only at war with the habit and custom by which our country has expanded, but is also a short-sighted blow at the security of property itself.

This Court has recently held that the possible dissipation of public moneys does not justify discrimination among individuals who otherwise have the same relationship with the state. *Sherbert* v. *Verner*, 374 U. S. 398, 406-07 (1963). See also *Toomer* v. *Witsell*, 334 U. S. 385 (1948).

Even assuming, *arguendo*, that protection of the public purse is a valid purpose for the residence requirement, the facts are that the public purse is not endangered because few people move to another state solely to obtain welfare. The contrary contention assumes that poor people throughout the country have considerable knowledge of the welfare laws of the various states and take them into consideration in a decision to move. The facts are otherwise.

The Social Welfare Department of the State of New York found that in one year only two per cent of all public assistance recipients had lived in New York for less than a year. Kasius, *What Happens in a State Without Residence Requirements*, in *Residence Laws: Road Block to Human Welfare* 19-20 (1956). A lengthy study of public assistance in New York found that "the present laws [which contain no residence requirement] are sufficient to protect the taxpayer without penalizing the unfortunate." *State of New*

York, Moreland Commission on Welfare, Public Welfare in the State of New York, 27-28 (1963). See also Hyde, *The Trouble with Residence Laws,* 16 *Public Welfare* 103, 105 (1958). The Kasius study concluded on the problem under discussion that "to assume that people are influenced to move or not to move, according to the availability of help on a relief basis, is to misunderstand the dynamics of human behavior." (Kasius, *supra,* at p. 20.)

Rhode Island, which abolished all residence requirements during World War II, found that despite the fact that it paid higher welfare benefits than surrounding states, its welfare cost declined during the period in which there were no residence requirements. Leet, *Rhode Island Abolishes Settlement,* 18 *Soc. Serv. Rev.* 281, 283-84 (1944). Leet states that the Rhode Island State Welfare Department was unable to locate a single individual who had moved into the state in order to secure assistance. (Leet, *supra,* at 283.) See also, *New York State Department of Welfare, The Movement of Population and Public Welfare in New York State* 13 (1958); Falk, *Social Action on Settlement Laws,* 18 Soc. Serv. Rev. 288, 294 (1944).

Even if we assume that some people move to Connecticut to enjoy a greener welfare pasture, and even if we further assume that a state may properly deny welfare benefits to persons who come with that intent, the one-year residence requirement is not a reasonable means to achieve that purpose. It has the effect of a conclusive presumption that all people who need aid within a year of arrival have come for that purpose. It not only denies the necessities of life to people who have been so motivated but also imposes such denial on others who have come for different reasons. Furthermore, the main brunt of the denial of aid is borne

by those who have no responsibility for the decision to migrate—the children. To deny needed aid to them under such circumstances is clearly arbitrary and unreasonable. The instant case, in which there is no evidence that Mrs. Thompson came to Connecticut to obtain welfare benefits, is a perfect illustration of the over-inclusive breadth of the residence requirements. As was stated in *Oyama* v. *California*, 332 U. S. 633, 646-47 (1947): "[A]ssuming, for the purpose of argument only, that the basic prohibition is constitutional, it does not follow that there is no constitutional limit to the means which may be used to enforce it." Denying welfare to the relatively few people who may migrate to the state to obtain welfare benefits (even if this were a valid goal) does not justify a one-year residence requirement which denies the necessities of life to the many who migrate to a state for other reasons. See generally tenBroek, *The Constitution and the Right of Free Movement* 15 (1955):

> Length-of-residence requirements in public welfare violate the equal protection command of the Fourteenth Amendment. Public welfare aids and services are granted for the purpose of meeting needs. Newcomers have these needs as well as long-time residents. They therefore stand in the same relationship to the purpose of the law as do long-time residents. Under the Equal Protection Clause they must be treated alike.

One study reported that the administrative cost of investigating cases to enforce residence laws costs more money than is saved by the residence requirement. Certainly, there is no showing in the instant case that a substantial amount of public funds would be saved by retaining the residence requirement. *State of New York,*

Moreland Commission on Welfare, Public Welfare in the State of New York, 28 (1963).

Another possible purpose of the residence requirement is to provide an objective method of proving that the applicant is a domiciliary, that is, that he has come to the state with the intent to remain there indefinitely. This assumes, of course, that one of the valid purposes of the welfare legislation is to provide benefits only to those who will have some relatively permanent relationship to the state. Assuming, *arguendo,* that purpose is valid, the evidence is overwhelming that the residence requirement is not needed to prove a domiciliary status. The residence requirement is over-reaching in that such a requirement prevents many applicants from obtaining assistance even though they are clearly living in the state with an intention to remain indefinitely. There is no evidence to show that such is not the intention of Mrs. Thompson. In the light of the often immediate need of applicants for food, clothing and shelter, the one-year residence requirement is a constitutionally unreasonable test for determining the intention aspect of domicile. More accurate and less burdensome alternatives are available to ascertain an individual's true intentions. Other factors may be investigated, such as examining reasons for a person's entering the state.

Closely aligned with the possible purpose of providing an objective test for determination of domicile is the possible purpose of efficiency in administration. It may be contended that such a waiting period avoids payments tainted with fraud or based on insufficient information. (See *Green* v. *Department of Public Welfare of State of Del.,* 270 F. Supp. at 177.) Whatever arguments may be

legitimately made to support a waiting period for all applicants, regardless of length of residence, they cannot reasonably be used to support a provision denying benefits to all needy and otherwise eligible applicants who have resided in the state less than one year and granting benefits to applicants similarly situated but who have resided in the state for more than one year. Connecticut has not and cannot demonstrate that the one-year residency requirement is in any sense necessary to the proper administration of its welfare laws. "As this court has held in analogous situations, constitutional deprivations may not be justified by some remote administrative benefit to the state." *Harman* v. *Forssenius,* 380 U. S. 528, 542 (1964). See also *Carrington* v. *Rash,* 380 U. S. 89, 96 (1965).

D. *Connecticut's Residence Requirements Inhibit the Mobility of the Groups for Which Mobility Is Most Essential, Are Therefore Incompatible With the Goals of an Open Economy, and Hence Are Irrational and Violate the Equal Protection Clause:*

1. Preface:

In attempting to protect its treasury, either by trying to prevent an influx of people coming to obtain higher welfare benefits or endeavoring generally to keep out people who cannot support themselves, Connecticut is impeding the mobility and the right to travel from state to state of those people who need to exercise that right the most. It is in the interest of the impoverished individual, as well as society, that he be able to leave the place where he has been unable to find opportunity and move to an area in which he may become a more productive member of society. These observations are elaborated in the next subsection.

The consequences of Connecticut's capricious residence classifications in granting welfare aid are thus severe and require analysis in order to determine the rationality of these classifications under the Equal Protection Clause. If the economic and social consequences of unequal treatment are injurious, that unequal treatment is unreasonable and in conflict with the Equal Protection Clause (cf. *Brown* v. *Board of Education, supra*, 347 U. S. 483, 492-94 (1954)). In the instant case, these consequences conflict with the manifest policies of the nation in promoting economic growth and full employment, and interfere with the implicit demands of an open economy and of the free market and free trade area established by the nation as a means to its goal of progress. These basic policies—and the means embraced to achieve them—have been reflected in the federal government's actions since the nation's birth.

We do not know what proportion of interstate migrants (whether to Connecticut or elsewhere) know of the applicable residence requirements prior to moving; nor is it necessary, in this action, to determine it. Whether or not the migrant has such knowledge, the effect of the requirements is to burden him unfairly and impede his mobility. If he has this foreknowledge, the requirements may deter his moving; if he does not, they may also deter or prevent a permanent move by forcing a "removal"[7] to his home state after he migrates and discovers his ineligibility. In any case, if he effects a change of residence, they penalize him for having chosen to be mobile and to remain in his new state. The foreknowledge, or lack of it,

[7] See Conn. Gen. Stat. §17-2d, quoted *supra*, p. 2 providing that one who is ineligible under the residence requirement and the exceptions thereto "shall be eligible only for temporary aid or care until arrangements are made for his return. . . ."

concerning residence requirements is consequently immaterial. If a cost or penalty is placed on mobility this will either reduce it, burden it unfairly, or some degree of the two.

2. The Importance of Residential Mobility:

a. *In general:*

A high degree of residential mobility is an essential element of an open economy, characterized by free markets and free trade, and is indispensable to economic growth and full employment. See, *e.g.*, Bakke, Introduction to Soc. Sci. Research Council, *Labor Mobility and Economic Opportunity (Essays)* 3 (1954):

> The free movement of labor is in large part responsible for the flexibility with which millions of people and an amazing number and variety of jobs have been matched, for the vast potential of enterprise, initiative, incentive, invention, and for the self-development and acquisition of skills, which contributed greatly to our economic development.

See also Jaffe & Stewart, *Manpower Resources and Utilization: Principles of Working Force Analysis* 339 (1951):

> [I]nternal migration in the United States has been and is today a necessary, if not sufficient, condition to the attainment of full employment . . . . [I]f the growth in economic opportunity fails to keep pace with the growth in the working force, migration or unemployment became the only two alternatives.

Vance [Professor of Sociology, University of North Carolina, Chapel Hill], Statement, in *Hearings Before the*

Select Committee to Investigate the Interstate Migration of Destitute Citizens, House of Representatives, 76th Cong., 3d Sess., Pursuant to H. Res. 63 and H. Res. 491, Part I (July 29, 30, 31 (1940)), page 414:

> Migration is not only a constitutional right of every American citizen; it is an economic necessity in the American economic system. This country is an economic unit with a predominantly national market. Industries, investments, goods, and labor respond to this economic and legal fact by crossing State lines at will. Such movements are necessary to develop, maintain, and stabilize the national economy.[8]

It is difficult indeed to reconcile the urgent demands for mobility made by our free economy with the impediments to it and the penalties for it created by residence requirements.[9]

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[7] See generally Sjaastad, *The Costs and Returns of Human Migration*, 70 Journal of Political Economy 80 (Supp., Oct. 1962, on "Investment in Human Beings"):

> This treatment [by the author] places migration in a resource allocation framework because it treats migration as a means in promoting efficient resource allocation and because migration is an activity which requires resources.

See also Palmer, *Epilogue: Social Values in Labor Mobility*, in Soc. Sci., Research Council, *supra*, at pp. 113-114; LoGatto, *Residence Laws—A Step Forward or Backward?*, 7 *Catholic Lawyer* 101, 109 (1961).

[8] See Kasius, *What Happens in a State Without Residence Requirements*, in *Residence Laws: Road Block to Human Welfare*, *supra*, at p. 18:

> Practically all states are now engaged in advertising their resources with a view to attracting new residents. Those responsible for these efforts might well be asked how they reconcile their conflicting objectives of promoting the in-migration of people on the one hand and attempting to discourage it

b. *Poverty and immobility:*

Full mobility is particularly crucial—both for the persons involved and for the nation—in low-income groups and those displaced by technology. Indeed, the very eradication of poverty depends in substantial degree upon residential mobility. It has been noted by social scientists that one of the principal varieties of poverty is *insular* poverty —poverty which occurs when entire geographical areas become economically depressed.[10] Plainly, one of the simplest and most efficient ways of alleviating insular poverty is to maximize the opportunities for residents of the "island" to travel to areas of greater economic opportunities and industrial expansion. See Leet [Administrator of Public Assistance, Department of Social Welfare, Rhode Island], Testimony, in *Hearings, supra,* at pp. 141-42:

> The whole principle of local responsibility breaks down because the places where the greatest number of people in need [exist] are in stranded localities, where there are no tax sources to support them. The trends of migration are from the States of low economic opportunity to those of greater economic opportunities, and by and large that trend is a desirable thing. . . . It is probably better for the entire Nation that they move to an area where the possibilities of employment are greater. . . . I think it is very bad for the whole Nation

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on the other. When a State (or its industries) thus invites people to seek new opportunities, it can expect to draw a small number of persons who in the course of a year may become sick, disabled, jobless, or otherwise dependent through no fault of their own. Industrial progress creates its own social problems. These problems must be faced for what they mean as a moral as well as a legal responsibility.

[10] See Galbraith, *The Affluent Society* 326 (College Ed. 1960).

to have settlement laws that have the effect of chaining people, like serfs in the Middle Ages, to the soil on which they happen to be born.[11]

3. The Inhibitory Effect of Residency Requirements:

A residency requirement penalizes persons in need of public assistance for the act of changing their state of residence. It exacts as the penalty for migrating the needed aid income withheld on a discriminatory basis from recent entrants. The settlement requirement thus greatly deters the permanent relocation of those who might otherwise migrate in search of a better job or better living conditions. See Harvith, *The Constitutionality of Residence Require-*

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[11] *Cf.* Lorimer, in Testimony and Statement, in *Hearings, supra*, at pp. 24, 13-14, 34:

> Some people have burst forth from areas suffering from the slow rot of economic deterioration, without awaiting the assurance of any real opportunity anywhere else, only to encounter new times of frustration. . . . These people, I think, may well be characterized as the economic refugees of our very imperfect economic codes . . . (p. 24). The poorest families, the poorest areas, and the poorest States, where the ratio of children to the supporting adult population is highest, are absolutely unable to provide health and educational advantages equal to those available in more prosperous communities. As a result, the children growing up in rural areas are subject to the demoralization of disease, malnutrition, and inadequate education. . . . We are confronted with a vicious circle: cultural retardation, excessive fertility, population pressure, and poverty. We must discover ways of breaking this vicious chain of forces (pp. 13-14). [I]t has become a primary responsibility of the Federal Government to effect further advances in health, education and standards of living, which will both equip those who are going to remain in areas that are now depressed to achieve economic and social advance in their own communities and *at the same time equip those who must move elsewhere to participate effectively in the social and economic life of the communities into which they move* (p. 34). (Emphasis added.)

ments for General and Categorical Assistance Programs, 54 Calif. L. Rev. 567, 587 (1966):

> [F]or persons unable to live without public assistance for the required period, a residence test does bar interstate travel. . . . [A] clear distinction should be made between those persons whose only reason for migrating is to obtain higher assistance payments, and those persons who will be deterred from migrating if residence requirements in the new state would prevent them from receiving, for even a short period of time, their present level of assistance. The latter are not motivated by any desire to get higher payments, but must be included in an enumeration of persons prevented from migrating by residence tests (pp. 579-80). The constitutional guarantee of freedom of movement, under the commerce clause or otherwise, may require a state to extend its assistance programs to nonresidents. Persons presently receiving assistance in their home state will be deterred from traveling to and through other states if they may thereby risk termination of assistance from their old home state, without qualifying for assistance in states they visit. Even if inconsistent determinations as to residence are avoided, travel is discouraged unless the traveler can be assured of assistance in the state where he needs it (p. 592).

At least one kind of welfare program has expressly recognized and sought to avert the obviously severe reduction in mobility entailed by loss of aid upon migration: In general, persons unemployed may move to another state and continue to draw unemployment compensation from

the state in which they had established the right to it. A major purpose of this interstate benefit system is to encourage mobility. See Caine, *Interstate Benefit Payment Plan*, 19 Employment Security Review 14, 15 (April, 1952):

> An effectively administered Interstate Benefit Program can also play an important part in solving the manpower problem that confronts our nation today. Workers who are unemployed because of shortages of material in one area, or who desire better work opportunities, are less reluctant to migrate to areas where there are better employment possibilities in defense industries because there is a cushion of unemployment insurance if they are not able to find employment promptly.

At a time when the nation is struggling to overcome the degrading and stultifying effects which poverty has on our society, these residence requirements (which severely limit the right of a human being, because he is poor, to move to another state) nullify the purpose of this effort.[12] Welfare payments, including those to recent arrivals in the state, are a form of "investment in people," and in the long run benefit the national economy as well as the recipients personally, by increasing consumer demand and creating jobs for private enterprise, and thus promoting economic growth. State interference with the flow of income to those in need and eligible for assistance thus retards the national goal of a continuously expanding economy. (See generally National Manpower Council (per Henry David), *supra*, at p. 114.)

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[12] See 42 U. S. C. §2701 which declares the purpose of the Economic Opportunity Program.

> Finally, we should note that the migrant is a person who not only responds to increased economic opportunity by moving from one area to another but also helps to create economic opportunity in the area receiving him. We shall not pursue this topic further here, except to point out that the migrant is a consumer as well as a producer—a mouth as well as a pair of arms. The immigrant, by increasing the size of the consuming population in the area to which he has migrated, increases the demand for consumers' goods and services there and, hence, tends to increase economic opportunity in that area. This is particularly true in an expanding economy where additional labor is required to exploit economic potentialities. So far as the exporting and receiving countries are concerned, the migration from one to the other tends to improve the balance of labor in relation to economic opportunity. Jaffe & Stewart, *supra,* at p. 321.

This Court, particularly during the past twenty years, in dozens of cases unnecessary to cite, has enforced the Constitution so as to prevent discrimination against the poor which forecloses and withholds the opportunities they so desperately need. To reverse the decision of the three-judge court in the instant case would be a regrettable step backward in the national effort to ameliorate the living conditions of the poor and to maintain a continuously expanding economy.

II.

The Connecticut residence requirement abridges privileges and immunities of citizens of the United States.

The first section of the Fourteenth Amendment to the United States Constitution provides in part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . .

There could be no privilege of national citizenship more obvious than the right to travel from one state to another within the nation. If we deny the right or make it difficult for a United States citizen to move from one state to another we divest the right to travel of much of its value and meaning. In *Edwards* v. *California, supra,* the rationale of the majority for striking down the statute was that the Commerce Clause was violated. However, Justices Jackson, Douglas, Black and Murphy would have rested the unconstitutionality of the statute on a violation of the Privileges and Immunities Clause based upon the abridgment of the right to travel.

This Court has quieted any doubts that might have remained about the existence of the constitutional right of interstate travel. In *United States* v. *Guest,* 383 U. S. 745, 759 (1966), this Court ruled that: "Although there have been recurring differences in emphasis within the Court as to the source of the constitutional right of interstate travel, there is no need here to canvass those differences further. All have agreed that the right exists." See *Zemel* v. *Rusk,* 381 U. S. 1, 14 (1965); *Aptheker* v. *Secretary of*

State, 378 U. S. 500, 505-06 (1964); *Kent* v. *Dulles,* 357 U. S. 116, 126-27 (1958).

As Mr. Justice Jackson said concurring in *Edwards* (314 U. S. at 183):

> [I]t is a privilege of citizenship of the United States, protected from state abridgment, to enter any state of the union, either for temporary sojourn or for the establishment of permanent residence therein, and for gaining resultant citizenship thereof. If National citizenship means less than this, it means nothing.

While it is true that the statutes and regulations under discussion do not expressly prohibit the right to move from one state to another, as a practical matter the person who is in need of welfare cannot move. At the very least, the residence requirement *abridges* such travel or makes it extremely burdensome. While prior "right to travel cases" have been concerned with express prohibition of travel, *United States* v. *Guest, supra,* makes it clear that *discouragement* of interstate travel also abridges privileges of national citizenship.

To deny a benefit of such crucial importance to the poor as public assistance or aid to dependent children because of failure to satisfy residence requirements is to rob the right to travel of much of its value. See LoGatto, *supra,* at page 109, quoting tenBroek, *The Constitution and the Right of Free Movement,* 12 (1955):

> One very competent student of the problem of free movement and its constitutional protection feels very strongly that an indispensable element of the right of free movement is the right to be on an equal footing

with established residents of the community. "If you may be denied substantial rights after arrival, if you may be barred from the common callings and resources of the community available to others, if opportunities of life and livelihood may be withheld from you on a discriminatory basis, then the right to go there is emptied of all substance and meaning" [tenBroek, *supra*, at page 15].

The instant statutes and regulations deny privileges of United States citizenship and discriminate against people who need the privileges and the equal treatment more than any other class of people in our country.

III.

Connecticut's residence requirements for aid to dependent children violate the Commerce Clause of the Constitution by imposing a substantial and unreasonable burden on interstate commerce.

A. *Economic Protectionism by States (Whether Inter Se or Against Foreign Commerce) Is Prohibited by the Commerce Clause; the States Are Therefore Not Entitled to Erect Barriers to the Travel or Transportation of Persons or Property Across Their Borders*

Economic protectionism has no place in the nation's community of states. The Union was intended to be, as far as possible, a free and open trade market, without trade barriers, and with the maximum possible mobility of labor. See, e.g., *Memphis Steam Laundry Cleaner* v. *Stone*, 342 U. S. 389 (1952), in which the court invalidated a Mississippi tax upon the privilege of soliciting business for a laundry not licensed therein stating at p. 395:

> The Commerce Clause created the nation-wide area of free trade essential to this country's economic welfare by removing state lines as impediments to intercourse between the states. The tax imposed in this case made the Mississippi state line into a local obstruction to the flow of interstate commerce that cannot stand under the Commerce Clause.

See also *Baldwin* v. *G. A. F. Seelig, Inc.*, 294 U. S. 511 (1935) (held invalid portion of New York statute making applicable to milk imported from other states system of minimum prices to be paid by dealers to producers and prohibiting sale in New York unless prices maintained).

The states thus have no right to erect barriers to the travel or movement of persons or property across their borders, whether by physical exclusion or penal sanctions; or by exacting a payment (tariffs, duties, taxes) for entry; or by requiring an entrant to forego income for a certain period as a condition precedent to being treated like other residents, as herein. In particular, they may not do so in order to protect their economies at the possible expense of other states, or to isolate themselves from the problems of other states. Thus, in *Edwards* v. *California*, 314 U. S. 160 (1941), the Court invalidated a statute making it a crime knowingly to transport indigents into the State. The decision was grounded upon the Commerce Clause (U. S. Const., Art. I, Sec. 8), the Court stating at pp. 173-74:

> We have repeatedly and recently affirmed, and we now reaffirm, that we do not conceive it our function to pass upon "the wisdom, need, or appropriateness" of the legislative efforts of the States to solve such difficulties [arising from internal migration]. [citation]

But this does not mean that there are no boundaries to the permissible area of State legislative activity. There are. And none is more certain than the prohibition against attempts on the part of any single State to isolate itself from difficulties common to all of them by restraining the transportation of persons and property across its borders. It is frequently the case that a State might gain a momentary respite from the pressure of events by the simple expedient of shutting its gates to the outside world. But, in the words of Mr. Justice Cardozo: "The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several States must sink or swim together, and that in the long run prosperity and salvation are in union and not division." *Baldwin* v. *Seelig*, 294 U. S. 511, 523.[13]

The economic rationale of free trade is too well known and too well established to bear lengthy discussion. We shall simply note the terse observation in Samuelson, *Economics*, 545 (7th ed. 1967) that "One of the reasons the United States is so prosperous is that ours is so *large* a free trade area." (Emphasis in original.)[14]

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[13] Cf. *Crandall* v. *Nevada*, 6 Wall. (73 U. S.) 35, 49 (1868) (concurring opinion of Clifford, J., referring to the state tax upon egress of persons using commercial transportation which was invalidated by the majority): "I am clear that the state legislature cannot impose any such burden upon commerce among the several states. Such commerce is secured against such legislation in the states by the Constitution, irrespective of any Congressional action."

[14] See also *H. P. Hood & Sons* v. *Du Mond*, 336 U. S. 525, 530-531, 533 (1949); *Duckworth* v. *State of Arkansas*, 314 U. S. 390, 400-401 (1941) (Jackson, J., concurring).

Although the instant statutes and regulations do not exact a money price for human entry, they require the entrant to forego income to which other residents in need are entitled, and greatly delay the time when he will receive the same entitlement. They are, in effect, "invisible tariffs." *Cf.* Samuelson, *supra,* at page 750:

> Finally, we should mention the so-called "invisible tariff." In many countries—and the United States is no exception—the complicated administration of the customs can be as bad as the monetary duty that has to be paid, or worse. If an importer's shipments are unduly delayed or if a foreigner's exports to us are refused admittance for complicated reasons of health or of failure to comply with arbitrary regulations, then such red tape can be as harmful to trade as outright tariffs or quotas.

The equivalent discrimination against interstate migration cannot be countenanced under the Commerce Clause.

> Of course, taxation was (and is) not the only problem. State and local regulations, too, may favor the part at the expense of the whole. To guard against these difficulties was a prime purpose of the Constitution. It has not been without success. Indeed, there are those who find the genius of American industry not in Big Technology (or some special capacity of our businessmen) but in the incentive of a Big Open Market. (Mendelson, in his Epilogue in Frankfurter, *The Commerce Clause Under Marshall, Taney and Waite,* 118-19 (1937).)

B. *Connecticut's Protectionist Residence Tests Impede Residential Mobility. They Thus Constrict Interstate Travel and Unlawfully Burden Interstate Commerce.*

The discussion above (section I-D) concerning the immobilizing effect of the instant residence requirements is fully applicable at this point. The integrity of the free trade area intended by the framers of the Constitution in creating the commerce clause is seriously compromised by the *"barriers caused by restrictive residence or settlement requirements"* (in the words of the State of Connecticut in its Interstate Compact on Welfare Services (Conn. Gen. Stat. section 17-21a, Art. I, *supra*))—barriers which inhibit mobility and penalize interstate travelers who change their state of residence. Connecticut's residence tests for welfare services should thus be disallowed as inconsistent with the commerce clause.

CONCLUSION

> It [a state restriction on interstate travel by the poor] would prevent a citizen because he was poor from seeking new horizons in other states. It might thus withhold from large segments of our people that mobility which is basic to any guarantee of freedom of opportunity. (Douglas, J., concurring in *Edwards* v. *California, supra,* 314 U. S. at 181.)

For all of the foregoing reasons, *amici* respectfully urge this Court to affirm the judgment of the United States District Court.

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Supreme Court of the United States

October Term, 1968

No. [redacted]9

BERNARD SHAPIRO, Welfare Commissioner of Connecticut,
Appellant,

v.

VIVIAN THOMPSON,
Appellee.

No. [redacted]33

WALTER E. WASHINGTON, *et al.*,
Appellants,

v.

MINNIE HARRELL, *et al.*,
Appellees.

No. [redacted]34

ROGER A. REYNOLDS, *et al.*,
Appellants,

v.

JUANITA SMITH, *et al.*,
Appellees.

On Appeal from the District Courts of Connecticut, District of Columbia and the Eastern District of Pennsylvania

---

BRIEF OF AMERICAN JEWISH CONGRESS, COUNCIL OF JEWISH FEDERATIONS AND WELFARE FUNDS, INC., NATIONAL CONFERENCE OF CATHOLIC CHARITIES, NATIONAL COUNCIL OF THE CHURCHES OF CHRIST IN THE U. S. A. and SCHOLARSHIP, EDUCATION AND DEFENSE FUND FOR RACIAL EQUALITY, INC., AS *AMICI CURIAE*

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Supreme Court of the United States

October Term, 1967

No. 813

BERNARD SHAPIRO, Welfare Commissioner of Connecticut,
Appellant,

v.

VIVIAN THOMPSON,
Appellee.

No. 1134

WALTER E. WASHINGTON, *et al.*,
Appellants,

v.

MINNIE HARRELL, *et al.*,
Appellees.

No. 1138

ROGER A. REYNOLDS, *et al.*,
Appellants,

v.

JUANITA SMITH, *et al.*,
Appellees.

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BRIEF OF AMERICAN JEWISH CONGRESS, COUNCIL OF JEWISH FEDERATIONS AND WELFARE FUNDS, INC., NATIONAL CONFERENCE OF CATHOLIC CHARITIES, NATIONAL COUNCIL OF THE CHURCHES OF CHRIST IN THE U. S. A. and SCHOLARSHIP, EDUCATION AND DEFENSE FUND FOR RACIAL EQUALITY, INC., AS *AMICI CURIAE*

This brief *amici curiae* is submitted with the consent of the parties.

Statement of the Case

Each of these three cases involves an appeal from a decision by a three-judge District Court holding unconstitutional a state or Federal statutory provision imposing a residency requirement for eligibility for aid under the Federal program for Aid to Families with Dependent Children (hereinafter referred to as "AFDC") (Section 17-2d of Chapter 302 of the General Statutes of Connecticut; Section 3-203(a)(b) (1967) of the District of Columbia Code; and Section 432(6) of the Public Welfare Code of Pennsylvania).

With one exception,* each of the plaintiffs-appellees in the three cases are children, and the adults upon whom those children depend for maternal care, who have been denied benefits under AFDC solely on the ground that they have not resided in the respective state or the District of Columbia long enough to comply with the particular residency requirement. The District of Columbia and Pennsylvania cases (Nos. 1134 and 1138) are class actions.

In each of the cases, the defendants-appellants are officials responsible for administration of the AFDC program in their jurisdictions.

AFDC programs provide relief "[f]or the purpose of encouraging the care of dependent children in their own

* This brief is limited to the question of residency requirements under AFDC programs. Therefore, we do not address ourselves to the case of the one appellee in the District of Columbia case (Vera A. Barley) who challenges a residency requirement denying her relief under another categorical aid program, Aid for the Totally and Partially Disabled.

homes or in the homes of relatives by enabling each state to furnish assistance and rehabilitation and other services, * * *'" [42 U.S.C.A., Section 601]. Based upon a complicated formula set forth at 42 U.S.C.A., Section 603, qualifying AFDC state programs are reimbursed by the Federal Government in amounts varying between 50% and 80% of their payments.

Although the residency requirements differ in detail, the rejected applicants suing in each of the three cases would be required to reside within that state or the District of Columbia for one year before being eligible for AFDC benefits. In none of the cases does the respective government suggest that an alternative form of government relief is available to the rejected AFDC applicant, short of placing the child applicants in orphanages.

Although the facts with regard to each particular rejected applicant suing herein differ, the following generalizations can be made:

Appellees were denied relief because of failure to comply with residency requirements without regard to whether they had any alternative means of obtaining the necessities of life. Each of the appellees is unable to work for reasons independent of her having moved to the state, such as sickness, need to stay home to take care of very young children and, in the case of the child applicants, age.

Nothing in the records indicates that any of the rejected applicants suing here entered the respective state or the District of Columbia for the purpose of receiving higher welfare benefits than they received in the place they previously resided. In fact, Minnie Harrell and her family moved to the District of Columbia from an area where

relief payments were higher, Nassau County, New York. Nor is there anything in the records to indicate that the applicants attempted to obtain relief they would not be entitled to but for the fact that they did not reside in the state for the necessary period of time. The records indicate that most of the rejected families moved to the state or the District to be near relatives who at times provide some, albeit inadequate, support.

Interest of the *Amici*

The American Jewish Congress is a national organization of American Jews formed in part to protect the religious, civil, political and economic rights of Jews, to implement Jewish values and to promote the principles of democracy. The sacredness of human life is a foundation stone of Jewish ethics. It requires us to give aid to the poor not only as a charitable act motivated by pity, but as an obligation, an act of justice toward the recipient, who is entitled to it as a right by virtue of his common humanity with the giver. This is reflected in the fact that there is no word for charity in Hebrew; its nearest translation is "tzedakah" which translates into "righteousness" or "social justice." We believe that this fundamental concept of public responsibility to provide for the poor is embodied in the concepts of due process and equal protection.

The Council of Jewish Federations and Welfare Funds, Inc. is a national association of 222 central Jewish community organizations serving 800 communities representing 95% of the Jewish population of the United States. The Council is governed by an annual General Assembly, composed of delegates selected by the member community

organizations, which sets its policies and elects the Board of Directors and officers. In the area of health and welfare, it provides its members with consultation and information on community organization, planning for services to people, budgeting and fund raising. Direct services to member communities include help with representation of the organized American Jewish communities in collaboration with religious bodies and other public interest groups concerned with the provision of adequate, equitable and dignified public welfare services to people in need.

The National Conference of Catholic Charities was established in 1910 and is the coordinating body of the social service program of the Catholic Church in the United States. It seeks to integrate modern technology with the traditional concept of charity among Catholic workers, both professional and volunteer. The Conference provides consultation and planning assistance to local administrators, conducts research projects dealing with the present and future needs in the field, and furnishes information concerning current developments relating to welfare services. It represents the philosophy of Catholic social service to other professional groups, to national coordinating agencies, to the national Congress, and to Federal government offices.

The National Council of the Churches of Christ in the U. S. A. is a membership corporation incorporated in 1950 under the Membership Corporations Law of New York. It is the co-operative agency of thirty-four Protestant and Orthodox religious denominations with an aggregate membership of 42,000,000 throughout the United States. By its certificate of incorporation it is committed "to promote the application of the law of Christ in every rela-

tion of life." Since 1960 it has been its policy "to work for availability of adequate public assistance for all needy people; the elimination of state and local residence requirements for public assistance * * *."

The Scholarship, Education and Defense Fund for Racial Equality, Inc. (SEDFRE) is an independent national organization formed in 1962 to assist local community organizations and civil rights groups. Its services include scholarship assistance, specialized legal action and information activities on welfare and related government assistance. SEDFRE helps disenfranchised and deprived Negroes and poor whites to meet needs ranging from voting rights and improved schools to street lights and paved streets. It also seeks a better way to acquaint welfare clients with their rights under the law and encourages them to take the necessary steps to make sure that their rights are respected.

These organizations join in this brief because they have become increasingly concerned with the deepening gulf between the great majority of Americans who enjoy the benefits of our unparalleled affluence and the minority who have been denied the opportunity to share in our abundance. We believe that the concepts of human dignity embodied in our Constitution and Bill of Rights must be asserted in this area to prevent this society from abandoning its poor.*

* We have been authorized by the National Board of the Young Women's Christian Association of the U. S. A. to inform the Court that it supports the position taken in this brief. The National Board of the Young Women's Christian Association of the U. S. A. is a corporation organized in 1907 pursuant to the laws of the State of New York and is entrusted with the continuing work of the Young Women's Christian Association of the U. S. A., an organization of autonomous member Associations. As present it is composed of 421 community and 443 student Associations with 1,439,372 members and 878,566 additional participants.

Questions to Which This Brief is Addressed

1. Are children who are denied relief under the AFDC program solely because of noncompliance with a residency requirement deprived of their right to due process of law, in violation of the Fifth and Fourteenth Amendments?

2. Does such denial of relief under the AFDC program impose an unconstitutional burden on freedom to travel?

Summary of Argument

IA. Children who starve because our government fails to provide them with relief are deprived of due process of law in violation of the Fifth and Fourteenth Amendments. The concept that government has an obligation to provide for persons in need is deeply imbedded in our governmental system. It was embodied in Sixteenth Century statutes that formed the basis of subsequent legislation adopted by the American colonies and states. The Social Security Act of 1935 implicitly acknowledged that the obligation to assist the poor extends to the national government.

B. Historically, the obligation has not been accompanied by recognition of the right of the poor person to demand assistance. One result has been widespread denial of assistance, in part through "settlement laws," the forerunners of residency requirements. Residency requirements have the effect of denying relief even where there is no alternative escape from starvation.

C. The resulting denial of assistance is a deprivation of property. Where it leaves children to starve, it must be regarded also as a deprivation of "life" as that term is used in the Fifth and Fourteenth Amendments. As shown below in Point II, the justifications for that deprivation are without merit. Hence, the deprivation is a denial of due process.

D. Our constitutional system requires recognition of an individual enforceable right to poor relief. Absent such a right, the Due Process Clauses cease to be a protection for the poor as well as the rich.

IIA. This Court has repeatedly upheld the right to travel as one based on the Constitution. It has specifically held that the States may not exclude indigents.

B. Residency requirements place a burden on the right to travel because those poor who would travel face the threat of starvation.

C. The right to travel is closely related to the constitutional rights of free expression and therefore cannot be restricted except for compelling reasons. No such compelling reasons appear here. The reasons usually given hardly rise higher than considerations of covenience. Moreover, residency requirements deal with the asserted evils by a blunderbuss technique that is constitutionally impermissible.*

* This brief is not addressed to a third basis for challenging residency requirements, that they constitute a deprivation of equal protection of the laws. We believe that that challenge is also valid because of the absence of rational justification for the requirement.

ARGUMENT

POINT I

Children who starve because government fails to provide relief are deprived of due process of law, in violation of the Fifth and Fourteenth Amendments.

It is our position that a denial of AFDC assistance because of a residency requirement which may cause starvation and loss of life is a violation of the constitutional requirement of due process of law. Such a denial withholds assistance regardless of the reason for the applicant's presence in the state. Such an action is an arbitrary denial of property and, not inconceivably, of life, without due process of law.

A. The Obligation of Government to Provide for Persons in Need is Deeply Imbedded in Our Governmental System.

1. The test of what constitutes due process of law

In *Powell* v. *Alabama*, 287 U. S. 45, 65 (1932), this Court said:

> One test which has been applied to determine whether due process of law has been accorded in given instances is to ascertain what were the settled usages and modes of proceeding under the common and statute law of England before the Declaration of Independence, subject, however, to the qualification that they be shown not to have been unsuited to the civil and political condition of our ancestors by having been followed in this country after it became a nation.

Another test of the scope of the constitutional due process guarantees, probably the same in effect, is the requirement that government conform to "that whole community sense of 'decency and fairness' that has been woven by common experience into the fabric of acceptable conduct." *Breithaupt* v. *Abram,* 352 U.S. 432, 436 (1957). Due process bars governmental action which "shocks the conscience." *Rochin* v. *California,* 342 U.S. 165, 172 (1952). It requires protection of those rights that are "so rooted in the tradition and conscience of our people as to be ranked as fundamental." *Id.* at 169, citing *Snyder* v. *Massachusetts,* 291 U.S. 97, 105 (1934); see also *Palko* v. *Connecticut,* 302 U.S. 319, 325 (1937).

We submit that, by either of these tests, a statute that exposes children to the risk of starvation deprives them of due process of law.

2. The British antecedents

Provision for the basic needs of the poor has been recognized as a duty of society since biblical times.[1] For four hundred years this need has been recognized by Anglo-American law as an obligation of temporal government.

In 1572, Parliament passed a law (14 Elizabeth c. 5) which was a landmark in the development of governmental assistance to the poor.[2] It established as national policy

1. BIBLE (KING JAMES VERSION), *Deuteronomy* 14:28, 29, 26:12; Matthew 25:31-46.

2. English law on the subject of poor relief is relevant here not only because it illuminates the due process concept but also because American laws for relief of the poor were shaped by the English antecedents. Riesenfeld, "The Formative Era of American Public Assistance Law," 43 *Calif. L. Rev.* 175, 177 (1955).

that the poor must be provided for through monies raised by public taxation.[3] Revision in 1597 (39 Elizabeth c. 3) and, more important, in 1601 (43 Elizabeth c. 2) did much to establish the character of poor relief. tenBroeck, Jacobus, "California's Dual System of Family Law: Its Origin, Development and Present Status," Part I, 16 *Stanford L. Rev.* 257, 258 (1964).[4]

Professor tenBroeck described the salient feature of that period (at 262):

> The central concept and great achievement of the Elizabethan poor law was the firm establishment of the principle of public responsibility to maintain the destitute. Through it, the final step was taken, permanently shifting a part of the burden to relieve economic distress from the ecclesiastical, private, and voluntary to the civil, public and compulsory. The assumption of responsibility, moreover, was made by the nation and its application was nationwide.

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3. *Id.* at 180 *et seq.*

4. The principal section of 43 Eliz. c. 2 provided:

> That the churchwardens of every parish, and four * * * substantial householders there * * * shall be called overseers of the poor of the same parish; and they * * * shall take order from time to time, by and with the consent of two or more * * * justices of peace * * * for setting to work all such persons, married or unmarried, having no means to maintain them, and use no ordinary and daily trade of life to get their living by: and also to raise * * * (by taxation of every inhabitant * * * and of every occupier of lands, houses * * * or saleable underwoods in the same parish * * *) a convenient stock of flax, hemp, wool, thread, iron and other necessary ware and stuff, to set the poor on work: and also competent sums of money for and towards the necessary relief of the lame, impotent, old, blind, and such others among them, being poor and not able to work, and also for the putting out of such children to be apprentices * * *. (As modernized by Professor Riesenfeld, *id.* at 178.)

The obligation of government to insure survival and the role of the judiciary in providing relief to the poor is reflected in Gilbert's Act of 1782, summarized by Sidney and Beatrice Webb as follows (Webb, S. & B., ENGLISH LOCAL GOVERNMENT. English Poor Law History, Vol. 1, Longmans Green & Co. Ltd. (1927) at 171):

> "* * * any applicant who could not get employment in the ordinary way should by the Poor Law Guardians —without explaining how—be provided with it and be fed and lodged until it could be given. Failing such relief, any Justice of the Peace was expressly empowered, after inquiry upon oath, to order "some weekly or other relief."

In sum, the government duty to provide for the poor was so firmly implanted that, towards the end of the 18th century, Blackstone could state in his COMMENTARIES (page 95, American Editions of J. B. Lippincott & Co. from the 19th London Edition, page 131, 12th ed., London, 1793):

> The law not only regards life and member and protects every man in the enjoyment of them, but also furnishes him with everything necessary for their support. For there is no man so indigent or wretched, but he may demand a supply sufficient for all the necessaries of life from the more opulent part of the community, by means of the several statutes enacted for the relief of the poor.

This statement appears in Book I, entitled "Of the Rights of Persons," Chapter 1, entitled "Of the Absolute Rights of Individuals."

This "law of the land" was not confined to the homeland. An indication of England's concern that her colonial

governments provide for the needs of the poor is reflected in the request of the Committee for Trade and Foreign Plantations of the English Privy Council in 1680 for information as to provisions made in Connecticut for "relieving poor, decayed and impotent persons." Capen, HISTORICAL DEVELOPMENT OF THE POOR LAW OF CONNECTICUT (Columbia U. Press, 1905) at 22.

3. The American antecedents

A history of the reception of the English poor law into the thirteen original colonies, particularly with regard to government obligation to provide for the poor and the law of settlement is set forth by Riesenfeld (*op. cit. supra* at 203, *et seq.*). The early laws of the Massachusetts Bay Colony and New Plymouth clearly imposed the obligation on government officials (*Id.* at 204-208).

A detailed history of the development of the poor law in Connecticut is obtained in Capen, *op. cit. supra, passim.* (See also Riesenfeld, *supra,* at 209-212, 226-228.) As early as 1640, the colony of New Haven had provided for its poor (Capen, *op. cit. supra* at 22-23). The two colonies of Connecticut and New Haven had been united in 1665. In 1673, the general court ordered as follows:

> * * * every town within this colony, shall maintain their own poor. * * * If any person come to live in any town in this government, and be there received and entertained three months, if by sickness, lameness or the like, he comes to want relief; he shall be provided for by that town wherein he was so long entertained, and shall be reputed their proper charge, unless such person has within the said three months been

> warned by the constable, or some one or more of the selectmen of that town, not there to abide without leave first obtained of the town, and certify the same to the next court of assistants who shall otherwise order the charge arising about him according to justice. (Capen, *supra,* at 29-30, referring to Law No. 57 of 1673.)[5]

This public responsibility to support the destitute was also recognized in those states organized west of the Allegheny Mountains. Abbott, PUBLIC ASSISTANCE, AMERICAN PRINCIPLES AND POLICIES, Vol. 1 (1940), pp. 3-35. To give only one example (*Id.* at 5), Kansas acknowledged this government responsibility in its first constitution in 1859 by providing, in Article vii, sec. 4:

> The respective counties of the State shall provide as may be prescribed by law for those inhabitants who, by reason of age, infirmity, or other misfortune, may have claims upon the sympathy and aid of society.

Thus England, the American colonies and the states regarded themselves as being legally obligated to provide for the poor. Justice Brewer was speaking of a principle by then fundamental to the entire country when he said, in *State ex rel. Griffith* v. *Osawkee Twp.,* 14 Kan. 418, 421 (1875), prior to his elevation to this Court:

> The relief of the poor, the care of those who are unable to care for themselves, is among the unquestioned objects of public duty. In obedience to the impulses of common humanity, it is everywhere so recognized.

5. For developments in Pennsylvania, see Beitel, TREATISE ON THE POOR LAWS OF PENNSYLVANIA (T. & J. W. Thompson & Co., Pa. (1899)); Heffner, HISTORY OF POOR RELIEF LEGISLATION IN PENNSYLVANIA, 1682-1913, Holzapfel Publishing Co. (1913).

With the adoption of the Social Security Act of 1935, the involvement of government in providing basic needs assumed new dimensions. "The law established the individual's immediate welfare as a matter of national concern entitled to consideration in the deployment of national resources." Wedemeyer, J. M. and Moore, Percy, "The American Welfare System," 54 *Calif. L. Rev.* 326, 347 (1966). Adoption of the Act constituted recognition that participation of the national government was inevitable "* * * if the people were not to starve." *Steward Machine Co.* v. *Davis,* 301 U. S. 548, 586 (1937).

B. The Absence of an Individual Right to Enforce the Governmental Responsibility Results in Large-Scale Evasion of the Responsibility.

1. The denial of an individual right

While British and Anglo-American law thus recognized a governmental obligation toward the poor, it must be conceded that it did not recognize an individual right to enforce that obligation. As the Webbs pointed out, "What was enacted was not a right at all, but an obligation." *Op. cit. supra,* p. 401. Poverty was treated as a public nuisance, subject to abatement by public officials (*ibid.*).

Similarly, in this country, the obligation of the government to provide for the poor was not regarded as vesting a right in the individual poor person to compel government to meet its obligation through recourse to the courts.

> The English law has perhaps again influenced our American statutes and their interpretation on this point. In England it has long been an established

> legal principle that the duty of the local authority to relieve the poor is "a duty owed to the public and not to the poor person himself," and that "no action can be brought * * * by the poor person if relief is refused him, or if an officer is negligent in giving relief." (Abbott, *op. cit. supra,* p. 20, citing W. Ivor Jennings, THE POOR LAW CODE (London, 1930), p. lxxvi.)

Cf. Reich, C., "The New Property," 73 *Yale L. J.* 733 (1964); Reich, C., "Individual Rights and Social Welfare: The Emerging Legal Issues," 74 *Yale L. J.* 1245 (1965).

2. The resulting denial of aid to the poor

The isolation of the obligation of government from the development of corresponding rights and duties has had disastrous results. Without enforcement of individual rights by court action, local administrators were free to limit relief in almost any way they saw fit. Chief among the limitations were the settlement laws, the direct ancestors of the present day residency requirements. tenBroeck, *op. cit. supra,* at 263. The resulting evils, from Elizabethan times to the present, are described by Professor tenBroeck (*Id.* at 265):

> Only those who had been born in a community or had long lived there were eligible. Other poor persons were kept out or removed to the place of their settlement. The size of the taxing and paying unit thus was determinative. From the community's point of view it supported only its own. From the pauper's point of view, he was bound to the place of his misfortune, restricted in his free movement and his personal opportunity. From society's point of view, the economy was fragmented, rendering more difficult the solution of

economic problems that were regional and national. All of this is true today.[6]

Residency requirements are applied regardless of whether the rejected recipients have any alternative source of support for staying alive. As far as the state is concerned, these people are left to starve to death. If they are fortunate, they may obtain relief from a voluntary charity of an amount the charity feels it can afford. No voluntary organization is required to provide such relief. And when there are no private agencies or no money, people not receiving public relief may actually starve or freeze to death.

Thus, implicit in the defense of these three states to their right to use residency requirements as an absolute bar to AFDC payments, no matter how great the need of the applicant, is the proposition that the state may let children residing within its boundaries die for lack of such necessities as food and shelter.

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6. For other evils see Riesenfeld and Maxwell, MODERN SOCIAL LEGISLATION, 709 (1950):

> The need for or the actual receipt of assistance created * * * a veritable *"pauper status."* Thus the pauper was required to wear a badge with the letter P, a practice which was first given statutory sanction by the Pennsylvania Poor Law Amendment Act of 1718, 3 Pa. Stat. at L. 1712-1724, 221 (1896); he was required to be farmed out to the bidder at public auction, see, *e.g.,* Indiana Poor Law of 1807 * * *; he could be thrown into the poor-house against his will, see, *e.g., Harrison* v. *Gilbert,* 71 Conn. 724, 43 Atl. 190 (1899) (denying a writ of habeas corpus); he could and apparently still can, without violation of his constitutional guarantees, be forcibly removed to his place of settlement; *Lovell* v. *Seeback,* 45 Minn. 465, 48 N.W. 23 (1891); he lost the right to vote and still does under the constitution of Massachusetts, Mass. Const. Art. of Amendments III, and Texas, Tex. Const. Art. VI, Sec. 1.

AFDC is a last resort. The hardship which regularly results from its denial because of failure to meet residency requirements is aptly illustrated by the desperate situation Minnie Harrell and her three children face (one of the families in the District of Columbia case). Ill with cancer, unable to work, unable to continue staying at the small home of her brother (who has a wife and six children he is trying to support on wages of $1.60 per hour as a tire changer), the Child Welfare Division of the Department of Public Welfare of the District of Columbia can only suggest that Minnie Harrell consider placing her children in an orphanage.

Nowhere in the record of any of the three cases is there any suggestion that denial of AFDC benefits is dependent upon the availability of alternative relief programs for which the rejected AFDC applicants are eligible. The extent of the failure of AFDC to meet the needs of the one child out of every five children in this country who lives below the poverty line is implicit in the following statement (Orshansky, "Counting the Poor: Another Look at the Poverty Profile," *Social Security Bulletin*, U. S. Dept. of Health, Education and Welfare, January, 1965, pp. 15-16):

> In contrast to this total of 15.6 million needy children, in December 1963 only 3.1 million children were receiving assistance in the form of aid to families with dependent children, the public program designed especially for them.

Children are kept off the welfare rolls and denied AFDC payments for many reasons. One of them is because such children fail to meet residency requirements.

C. The Denial of AFDC Relief Because of Residency Requirements Results in a Denial of Life and Property.

In 1964, there were 34.1 million Americans, of whom almost 15 million were children, whose income was below the poverty line.[7] Orshansky, "Recounting the Poor—A Five-Year Review," *Social Security Bulletin,* U. S. Dept. of Health, Education and Welfare, April 1966, pp. 12, 13. For these people, each day requires a choice between an adequate diet of the most economical type and some other necessity because there is not enough money for both. Of the 15 million children living below the poverty line in 1964, 5.7 million were under age six (*ibid.*).

Whether one regards the benefits provided pursuant to the categorical assistance programs of the Social Security Act as "rights" or "privileges," they must be recognized as basic to human survival. Unlike many other benefits provided by government, the Social Security Act programs provide only for needs basic to life and usually less than that. Although states establish minimum standards of health and decency the Act only requires assistance be furnished "as far as practicable under the conditions in such State." 42 U.S.C.A. Section 601. As a result many states pay only a percentage of their own minimum standard. The survival which these payments permit is commonly one in which the beneficiaries are ill housed, ill clothed and

7. The poverty line is defined in Orshansky, "Counting the Poor," *op. cit. supra,* pp. 5-13. It is based on an "economy" food plan prepared by the Department of Agriculture for "temporary or emergency use when funds are low" (at p. 6) and allows an average of 70 cents per day per person for food and an additional $1.40 per day per person for all other items, including housing, medical care, clothing and carfare (p. 4).

ill fed. As we have just been told by the National Advisory Commission on Civil Disorders (U. S. Riot Commission Report, Bantam Books ed. (1968), p. 458):

> This sum [an average of about $36 monthly for each recipient of AFDC] is well below the poverty subsistence level under any standard. The National Advisory Council on Public Welfare has commented:
>
> "The national average provides little more than half the amounts admittedly required by a family for subsistence; in some low-income states, it is less than a quarter of that amount. The low public assistance payments contribute to the perpetuation of poverty and deprivation that extend into future generations."

We submit that the poor are plainly deprived of "property" when government withholds the relief it is responsible for supplying. The deprivation of life itself, however, is of greater concern. As we have shown, the residency requirement is imposed by the states without regard to the consequences to the individual family or its children. They are literally left to starve. Even if they escape death the resulting impairment of both mental and physical health must be viewed as a deprivation of "life" as that term is used in the Fifth and Fourteenth Amendments.[8]

We recognize, of course, that it is not enough to show that there has been a deprivation of life or property. The deprivation must be "without due process of law." Here, it is argued that the deprivation is not without due process because the residency requirement is reasonably designed

8. See *New York Times*, March 25, 1968, p. 47, "Hunger and Sickness Affect Mississippi Negro Children"; *New York Post*, March 27, 1968, p. 2, "Secret Report: 10 Million Go Hungry in U.S."

to achieve proper public objectives. The various justifications given for the requirement are dealt with below (Point IIC) in the discussion of the restraint on the right to travel. The remaining point to be made here is that the denial of due process may not be upheld on the ground that the individual poor person has no right to obtain enforcement of the governmental responsibility.

D. Our Constitutional System Requires Recognition of an Individual Enforceable Right to Poor Relief.

We believe we have shown that the obligation of government to provide poor relief is so fundamental and of such long standing as to be regarded as part of the basic "law of the land" which is incorporated in the due process concept. It would be inconsistent with our system of law to recognize this responsibility while denying those who would benefit from it the right to enforce it.

Absent such a right, the Federal and state governments and their agents are free to adopt any rule they may choose to limit their performance of their recognized responsibility. This Court said in *Jones* v. *Securities and Exchange Commission,* 298 U. S. 1, 23-24 (1935):

> * * * to the precise extent that the mere will of an official or an official body is permitted to take the place of allowable official discretion or to supplant the standing law as a rule of human conduct, the government ceases to be one of laws and becomes an autocracy.

See also Justice Brandeis concurring in *St. Joseph Stockyards Co.* v. *United States,* 298 U. S. 38, 84 (1936); Justice Jackson concurring in *Youngstown Sheet & Tool Co.* v. *Sawyer,* 343 U. S. 579, 646 (1952).

The Due Process Clause has stood as a guarantee of the liberties of Americans largely because of its expanding enforcement of purely procedural rights. The fact that the right of the individual poor person to claim his due has not been recognized up to now is not a barrier to present recognition, if in fact the right is essential to assuring "decency and fairness." As this Court said in *Wolf* v. *Colorado*, 338 U.S. 25, 27 (1949):

> It is of the very nature of a free society to advance in its standards of what is deemed reasonable and right. Representing as it does a living principle, due process is not confined within a permanent catalogue of what may at a given time be deemed the limits or the essentials of fundamental rights.

See also *Frank* v. *Maryland*, 359 U.S. 360, 371 (1959). It is particularly appropriate that due process develops so as to protect the poor. As stated in *Wolf, supra*, 338 U.S. at 27:

> This Clause exacts from the States for the lowliest and the most outcast all that is "implicit in the concept of ordered liberty" (citing *Palko* v. *Connecticut*, 302 U.S. 319, 325 (1937)).

POINT II

Residency requirements place an unconstitutional burden on the right to travel.

Government cannot bargain with the poor so as to buy up basic rights of citizenship in exchange for the necessities of life. Residency requirements in effect take from the poor the right to travel, the right to make the most of job opportunity and freedom to associate with relatives and loved ones.

A. The Right to Travel

In *United States* v. *Guest*, 383 U.S. 745, 757 (1966), this Court said:

> The constitutional right to travel from one State to another, and necessarily to use the highways and other instrumentalities of interstate commerce in doing so, occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized.

Again at page 759, this Court said:

> Although there have been recurring differences in emphasis within the Court as to the source of the constitutional right of interstate travel, there is no need here to canvas those differences further. All have agreed that the right exists.

The importance attached by the Court to the right to travel is also reflected in cases dealing with international travel. *Kent* v. *Dulles*, 357 U. S. 116, 126 (1958); *Aptheker* v. *Secretary of State*, 378 U.S. 500, 505 (1964).

The right to travel includes the right to settle in a state. In *Edwards* v. *People of the State of California*, 314 U.S. 160 (1941), this Court held that a law making it a misdemeanor to assist in bringing into the state any indigent person who is not a resident of the state was unconstitutional. The defendant Edwards had assisted his indigent brother-in-law to enter California for the purpose of residing there. California argued that it could not bear the financial burden resulting from the migration of indigents to the state (at 168):

> Their coming here has alarmingly increased our taxes and the cost of welfare outlays, old age pensions,

and the care of the criminal, the indigent sick, the blind and the insane.

Should the States that have so long tolerated, and even fostered, the social conditions that have reduced their people to their state of poverty and wretchedness, be able to get rid of them by low relief and insignificant welfare allowances and drive them into California to become our public charges, upon our immeasurably higher standard of social services? Naturally, when these people can live on relief in California better than they can by working in Mississippi, Arkansas, Texas or Oklahoma, they will continue to come to this State.

This Court rejected that argument (at 173):

The State asserts that the huge influx of migrants into California in recent years has resulted in problems of health, morals, and especially finance, the proportions of which are staggering. It is not for us to say that this is not true. We have repeatedly and recently affirmed, and we now reaffirm, that we do not consider it our function to pass upon the wisdom, need, or appropriatness of the legislative efforts of the States to solve such difficulties [citing cases].

But this does not mean that there are no boundaries to the permissible area of State legislative activity. There are. And none is more certain than the prohibition against attempts on the part of any single State to isolate itself from difficulties common to all of them by restraining the transportation of persons and property across the borders.

Thus, this Court has made it clear that the poor have the right to travel as well as the rich. As Justice Jackson said, concurring in *Edwards* (at 185):

Any measure which would divide our citizenry on the basis of property into one class free to move from

> state to state and another class that is poverty-bound to the place where it has suffered misfortune is not only at war with the habit and custom by which our country has expanded, but it is also a shortsighted blow at the security of property itself.

See also the concurring opinion of Justice DOUGLAS (at 177).

B. The Burden on the Right to Travel Imposed by Residency Requirements

Residency requirements impair the right to travel when they burden its exercise by compelling forfeiture of government benefits. Here, as in *Sherbert* v. *Verner*, 374 U.S. 398 (1963), the citizen is forced to choose between the exercise of basic rights (there, the free exercise of religion) and the forfeiture of government benefits. The citizen is subjected to "a choice between the rock and the whirlpool." *Frost & Frost Trucking Company* v. *Railroad Commission*, 271 U.S. 583, 593 (1926).

This is precisely the predicament faced by AFDC recipients. The pressure to forego their right to travel is unmistakable. Denial of the basic benefits involved here derives solely from the exercise of the constitutionally protected right to travel.

This Court has consistently rejected distinctions based on the fact that the potential beneficiary is not prevented from exercising his basic rights, but merely deterred or inhibited. "The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions." *Aptheker, supra*, 375 U.S. at 516, citing *NAACP*

v. *Button*, 371 U.S. 415 (1963). Even a "chilling effect" on the exercise of basic rights is sufficient to condemn restrictive action. *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965).

This is true where the benefits derivable from the state are far less valuable than those in question here. Indeed, even where the benefits are completely gratuitous and even ephemeral, they may not be subjected to conditions which "deter or inhibit" the exercise of basic rights. *Speiser* v. *Randall*, 357 U.S. 513 (1958) (a tax exemption conditioned on a loyalty oath).

The travels of the poor are already sufficiently encumbered by the fact of their poverty. As we show below in Point IIC, the poor travel for reasons far more basic than their affluent contemporaries.

It should be remembered that AFDC benefits are given only when the family has no alternative means of support. 42 U.S.C.A. §602(7). AFDC families cannot, in many cases, choose to forego the benefit and exercise the liberty to travel. Practically speaking, conditioning welfare benefits on residency tends to tie the poor to the place of their misfortune in the same manner as the English statutes regarding settlement and removal of the poor in the 18th Century. Those who do succeed in moving out of unsatisfactory circumstances often find themselves in a shocking position.

1. Some American citizens are stateless, having lost residence in one place without gaining it in another, and ineligible for assistance anywhere. Some of

these people can never become eligible because in certain states they cannot gain residence unless they are self-supporting.

2. Others are sent back to their place of residence even when their return is undesirable from the point of view of the individual or the community. Simons, Saville H., "Services to Uprooted and Unsettled Families," in *Social Welfare Forum* (National Conference on Social Welfare, 1962, pp. 165, 171).

C. The Restrictions Placed on the Right to Travel by Residency Requirements Are Not Justified by Compelling Necessity.

Like most constitutional rights, the right to travel is subject to restriction in the public interest. Yet, this Court has made it plain that restrictions may not be lightly imposed or sustained.

This Court has frequently referred to "the preferred place given in our scheme to the great freedoms secured by the First Amendment." *Thomas* v. *Collins*, 323 U.S. 516, 530 (1945). As stated in *Thomas*, "Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation" (323 U.S. at 530). In such cases, the "subordinating interest of the State must be compelling." *National Association for the Advancement of Colored People* v. *Alabama*, 357 U.S. 449, 463 (1958), quoting Justice FRANKFURTER concurring in *Sweezey* v. *New Hampshire*, 354 U.S. 234, 265 (1957). See also *Marsh* v. *Alabama*, 326 U.S. 501, 509 (1946); *Prince* v. *Massachusetts*, 321 U.S. 158, 164 (1944).

In *Aptheker*, this Court placed freedom to travel in the same category, saying (378 U.S. at 517):

> Similarly, since freedom of travel is a constitutional liberty closely related to rights of free speech and association, we believe that appellants in this case should not be required to assume the burden of demonstrating that Congress could not have written a statute constitutionally prohibiting their travel.

While residency requirements are not direct limitations on travel, when the choice is possible starvation if one does travel, the effect is little different from a direct prohibition.

Leeway may be given, presumably, for regulation by the states in areas of direct concern. When a state conditions the right to vote, or to become a member of the bar, on minimum residency, it can be concluded that, on balancing the indirect limitation on travel against the interest of the state, the state is legitimately protecting its electoral process or the functioning of its courts. Familiarity with conditions in the state is reasonably related to voting and familiarity with local law and court processes is reasonably related to the attorney function. In each case, the small limitation on travel is justified. But where, as here, the asserted interest of the state is balanced against the very life of a person, that interest must yield.

Moreover, we are dealing here with a national program, laid down in a national statute and funded primarily by the national government. The states that impose residency requirements are saying, in effect, that the benefits of this national program will be made available to those families

who stay in their home states but not to those who exercise their right to travel—to obtain jobs, to rejoin families or for any other reason, good or bad. We submit that this cannot be made a feature of a Federal program by the participating states. Not even the fact that the limitation may have been authorized by Congress (see 42 U.S.C.A. §602(b)) can immunize it against the constitutional right to travel from state to state.

In considering whether the residency limitation on freedom to travel is justified by compelling public interests, it should be noted, first, that it does not further but rather frustrates the purpose of the Federal statutory scheme. The purpose of the AFDC program is set forth in the Federal statute creating the program and authorizing Federal contributions to its financing:

> For the purpose of encouraging the care of dependent children in their own homes or in the homes of relatives by enabling each State to furnish financial assistance and rehabilitation and other services, as far as practicable under the conditions in such State, to needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life and to help such parents or relatives to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection, there is authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this subchapter. Social Security Act of 1935, § 401, as amended, 42 U.S.C.A., § 601.

Residency requirements bear no relationship whatever to this purpose. In fact, failure to provide assistance pay-

ments for one year will frustrate the purpose of the statute, often resulting in the break-up of homes prior to the time the family can become eligible for welfare. For example, the Harrell family in the District of Columbia case has been advised that since Mrs. Harrell and her three children are not eligible for AFDC payments, Mrs. Harrell should consider breaking up her home and placing her children in an orphanage. (See letter dated April 20, 1967 from Mrs. Jane Berry, Supervisor, D.C. Department of Public Welfare, annexed to the complaint in No. 1134 as Exhibit A.) The three-judge court in Delaware, recently holding that the AFDC residency requirement in Delaware is unconstitutional, said:

> It is evident to us that as to these families living in Delaware for less than one year the denial of public assistance fails to carry out the stated purposes for the Public Assistance Code. It in fact tends to frustrate them. The residency requirement prevents prompt assistance to some of the State's needy and distressed and to that extent is the antithesis of "humane." It also necessarily results in pressure on the solidarity of the family unit. Nor given these circumstances is it an acceptable answer to say that until they are here one year such persons are not a part of the state's needy and distressed. The discrimination based on length of residency thus finds no constitutional justification in the purpose declared in the statute itself. Green v. Department of Public Welfare, 270 F. Supp. 173, at 177 (D. Del., 1967).

What, then, are the justifications offered for residency requirements? They appear to be as follows: (1) the need to discourage poor persons from coming into the state or remaining in the state; (2) the need to make it unprofit-

able to come to a state to obtain higher AFDC benefits; (3) the need to provide an objective test of whether there is an intent to become a permanent resident of the state; and (4) the need to obtain certainty in preparing state budgets.

The first of these justifications is squarely in conflict with this Court's decision in the *Edwards* case. The direct holding of that case was that states may not exclude indigents.

The claim that residency requirements are needed in order to facilitate budgeting demeans our system of constitutionally protected rights. It is sufficient to say, as this Court said in *Carrington* v. *Rash*, 380 U.S. 89, 96 (1965), that "States may not casually deprive a class of individuals" of a valuable right (there, the right to vote) "because of some remote administrative benefit to the State."

The other two justifications are dealt with in detail in the decisions of the courts below in these three cases, as well as in decisions by other three-judge District Courts in cases now pending. We make but a few points here.

The legislative history of most if not all residency provisions reveals an assumption that indigents move from state to state to achieve higher welfare benefits and a further assumption that a residency requirement will halt or impede such movement (see Opinion of the court below in No. 813, App. 26a). Not only is the premise that people move to a state for the purpose of obtaining welfare assistance demonstrably false, but also the purpose of deter-

ring movement fails completely. As Simons wrote several years ago (*op. cit. supra,* p. 174):

> All evidence shows this not so. People move primarily to secure employment, to be with relatives, sometimes to find a more favorable climate, or in order to cope with emotional problems. California, Arizona and Florida have the highest residence requirements permitted, but they continue to have the highest in-migration in the country. On the other hand, in New York State even before the Anti-Abuse Law went into effect, when there was no legal residence requirement for public assistance, less than 2 per cent of the cases receiving assistance had been in the state less than one year, even though New York has high assistance standards and is surrounded by states that make lower payments.

Simon's statements are supported by statistics compiled by Robert J. Lampman from 1950 and 1960 census figures. "Population Change and Poverty Reduction, 1947-1975," in Fishman, L.(ed.), POVERTY AND AFFLUENCE (1966), pp. 36-37. Moreover, there is no indication from states that have repealed residency statutes of any increase in the number of in-migrants seeking a welfare bounty.

The simple fact is that poor people move for a variety of reasons. By far the largest population shift of recent decades has been that of the Southern Negro. That shift has been due primarily to the displacement of Negroes from Southern agriculture and increases in industrial employment in the North, as the National Advisory Commission on Civil Disorders made clear in its recent Report (*op. cit. supra,* pp. 236-242). See also, Myrdal, AN AMERICAN DILEMMA, pp. 188-9, 191, 193-6, 251 (1944).

Undoubtedly, *some* people move to obtain higher welfare benefits, but it should be noted that this is not true of any of the plaintiffs before this Court or in other cases challenging residency requirements in lower courts. For example, Vivian Thompson (in No. 813), Gloria Jean Brown, Clay Mae Legrant, Minnie Harrell (in No. 1134) and Mrs. Loretta Ramos (*Ramos* v. *Health & Social Service Board,* 276 F. Supp. 474 (E.D. Wisc. 1967)) and their children came to the respective jurisdictions to be near to or live with relatives. Mr. Green (*Green* v. *Dept. of Public Welfare, supra*) came to take a job as a construction laborer.

In any event, the residency requirement punishes not only those who may conceivably move for higher welfare payments but also the family looking for work and even the man who comes to the state having a job which ends for reasons beyond his control. The good are thus punished in order to get to the few bad. This blunderbuss technique is not constitutionally permissible, particularly where rights of freedom are involved. *Elfbrandt* v. *Russell,* 384 U.S. 11, 18-19 (1966); *Shelton* v. *Tucker,* 364 U.S. 479, 488 (1960), and cases there cited. As this Court said in *N.A.A.C.P.* v. *Button, supra,* 371 U.S. at 438:

> Broad prophylactic rules in the area of free expression are suspect. [Citations omitted.] Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.

We submit that the various justifications given for the residency requirement do not reveal that "compelling" interest of the state which alone can justify curtailment of constitutional freedoms. *N.A.A.C.P.* v. *Alabama, supra.* For that reason, the requirement must be held invalid.

Conclusion

It is respectfully submitted that the judgments below in each of these cases should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1968

No. 9

BERNARD SHAPIRO, Welfare Commissioner of Connecticut
Appellant,

vs.

VIVIAN THOMPSON
Appellee

On Appeal from the United States District Court for the District of Connecticut

BRIEF OF AMICUS CURIAE ON BEHALF OF APPELLEE

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BRIEF OF AMICUS CURIAE ON BEHALF OF APPELLEE

INTEREST OF THE BEXAR COUNTY LEGAL AID ASSOCIATION

The Bexar County Legal Aid Association was established in 1952 as a non-profit organization to furnish legal services to those inhabitants of Bexar County, Texas, who cannot afford the services of private attorneys. The legal staff of the Association has training and practical experience in most areas of law of consequence to low income persons, including public assistance law.

Attorneys on the staff of the Association presently represent clients in San Antonio, Texas, who have been denied grants under the Federal-State Aid to Families with Dependent Children (AFDC) program.

Such denials have been based on the operation of the twelve month durational residence requirement contained in Article 695c, Sec. 17, Paragraph (2) of Vernon's Texas Civil Statutes.

Litigation has been instituted on behalf of clients of the Association in the United States District Court, Western District of Texas, San Antonio Division to test the validity of the Texas welfare residence requirements. *Alvarez v. Hackney*, Civil Action No. 68-18-SA (W. D. Tex., 1968). By order entered March 27, 1968, a three-judge court preliminarily enjoined defendants, officers of the Texas State Department of Public Welfare, from enforcing the residency requirement as it applied to plaintiff, Alvarez. Such injunction is presently being enforced pending the decision of this Court in the case at bar. The position of the State of Texas in the *Alvarez* case is identical to the position it asserts as *amicus curiae* before this Court.

The Bexar County Legal Aid Association, on behalf of its client, Angelina B. Alvarez, and on behalf of all its other clients situated similarly to Appellee in the instant case, files this brief *amicus curiae* for two purposes. First, to answer the arguments of *amicus curiae* State of Texas made both in this Court in the instant case and in the District Court in the Texas case, and further, to support Appellee's claims that the AFDC residence requirements violate both the Equal Protection Clause and the right to freedom of movement.

ISSUES AND RELEVANCE

In reply to the brief of the *amicus curiae* State of Texas, and in support of Appellee herein, the Bexar

County Legal Aid Association will argue that state statutes, such as that of Texas and Connecticut, which impose as a prerequisite to consideration of an application for welfare assistance, a requirement that the applicant be a resident of the state for a stated minimum period of time, violate both the Equal Protection Clause of the Fourteenth Amendment and the right of free movement protected by the Commerce Clause and by the Privileges and Immunities Clause of the Fourteenth Amendment.

Discussion of these issues by the Association is relevant to the instant case because, as the statutes of Connecticut and Texas are similar on the point at issue, the decision of this Court will, no doubt, determine the constitutionality of the Texas statute. This is especially true in light of the words of the three-judge Court in *Alvarez*, the residency case pending in Texas, in its March, 1968 order directing a preliminary injunction. The Court said:

> "In view of the complexities of this case,... the fact that at least two of the residency requirement cases are presently awaiting argument in the Supreme Court, and the further obvious fact that the Court's decision in those cases will be enlightening to this Court before making a final decision on the merits, additional time will be required for a full consideration of this cause."

This brief is filed with the written consent of attorneys of both Appellant and Appellee as required by Supreme Court Rule 42(2).

SUMMARY OF ARGUMENT

The brief will argue first that in light of the express purpose of the Aid to Families with Dependent Children program (AFDC) to provide assistance to needy families with dependent children, the one year residence period required by the statutes of both Texas and Connecticut creates an arbitrary classification proscribed by the Equal Protection Clause of the Fourteenth Amendment.

The brief will further argue that the subject residency requirements are additionally violative of the right of United States citizens to travel to and establish permanent residence in the state of their choice, a right protected by the Privileges and Immunities Clause of the Fourteenth Amendment and by the Commerce Clause of the United States Constitution.

ARGUMENT

POINT I

The residence requirements of both Texas and Connecticut create, in light of the purpose of AFDC legislation, an unreasonable classification among families and thus constitute a denial of equal protection.

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution forbids any state "to deny to any person within its jurisdiction the equal protection of the laws." This constitutional

guarantee requires that all persons shall be treated alike under like circumstances and conditions. It is not here contended that the state may not classify when it legislates. The constitutional demand is not a demand that a statute or regulation necessarily apply equally to all persons. The Constitution does not require that things different in fact be treated in law as though they were the same. *Tigner v. Texas*, 310 U.S. 141, 147 (1939). Legislation and administrative regulations may impose special burdens upon defined classes in order to achieve permissible ends. But the Equal Protection Clause does require that, in defining a class subject to legislation, the distinctions that are drawn must have "some relevance to the purpose for which the classification is made." *Rinaldi v. Yeager*, 384 U.S. 305, 309 (1966); *Baxstrom v. Herold*, 383 U.S. 107, 111 (1966); *Carrington v. Rash*, 380 U.S. 89, 93 (1965); *Brown v. Bd. of Education*, 349 U.S. 294 (1955); *Morey v. Doud*, 354 U.S. 457 (1957); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886). In other words, there must be such a difference between the situation and circumstances of the members of the class and the situation and circumstances of all other members of the state as would present a just and natural reason for the difference made in their privileges and liabilities. Further, the difference upon which the classification is based, must be relevant "to the purpose for which the classification is made." *Rinaldi v. Yeager*, supra.

A relevant example of a clearly permissible classification is the one that permits "needy" families to receive welfare grants from the state. In that case there is clearly a difference between the circumstances of the needy

and all others and the difference is unquestionably related to the purposes of the legislation.

Turning to the instant case, it is necessary to review the legislation involved to determine if the classifications drawn by the states, discriminating as they do against newly arrived citizens, are in any way related to the purposes as expressed in AFDC legislation.

The Social Security Act of 1935 (49 Stat. 627) established the Federal Government's Aid to Families with Dependent Children program (AFDC). Under the act as amended, if a state passes legislation providing for AFDC and submits a program complying with federal requirements, the Federal Government will match, on an approximately three to one basis, each dollar the state appropriates for AFDC. The purpose of aid to dependent children as set forth in the Social Security Act, Title 42, U.S.C. Section 601, is to encourage:

> . . . the care of dependent children in their own homes or in the homes of relatives by enabling each State to furnish financial assistance and rehabilitation and other services . . . to needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life and to help such parents or relatives to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection. . .

Article 3, Section 51a, as amended, of the Texas Constitution and Article 695c, Section 6 of Vernon's Texas

Civil Statutes provide that the State Department of Public Welfare is to cooperate with the Federal Government for the purpose of carrying out the provisions of Title 42, U.S.C., Section 601-606.

The Texas AFDC statutes state that aid "shall be given. . . to any dependent child." Vernon's Texas Civil Statutes, Article 695c, Section 17, as amended. "Dependent child" is partially defined as:

> . . . any needy child. . . who has not sufficient income or other resources to provide a reasonable substistence compatible with decency and health. . . Vernon's Texas Civil Statutes, Article 695c, Section 17(6), as amended.

Of course, another paragraph of the Texas statutory definition of "dependent child" requires that the child have:

> . . . resided in this state for a period of at least one (1) year immediately preceding the date of application for assistance. . . Vernon's Texas Civil Statutes, Article 695c, Section 17(2), as amended.

On their face the statutes of Texas and Connecticut appear to be somewhat dissimilar. Texas gives aid to all "dependent children" but then simply defines that phrase to eliminate any child who has not resided in Texas for one year immediately preceding application for aid. (For those younger than one year old, the child must have been born in the state and have lived with an adult who has been living in Texas for at least one year immediately preceding application.)

The Connecticut statute requires satisfaction of the one-year residency requirement only by those arriving in Connecticut "without visible means of support for the immediate future" Conn. Gen. Stat. Section 17-2d. Because of the differences in statutory language, those new citizens arriving in the two states with the ability to support themselves and who then within a year lose that ability are treated differently. In Connecticut the originally solvent newcomer would appear to be immediately eligible for assistance; under the Texas statute, no matter what his economic status upon arrival, if the newcomer becomes "needy" during his first year in Texas, he is ineligible for aid.

While it thus appears that the Texas residency requirement eliminates a broader class of otherwise eligible applicants, the Connecticut statute is even more invidious in its discriminations. Texas discriminates bluntly between those citizens living in the state for more than one year and those not. Connecticut, however, adds to that classification a further discrimination among its new arrivals based on their apparent ability to support themselves.

Whatever their differences, the residency requirements of both states have the effect of creating at least two classes; first, a class of needy families, the members of which receive AFDC assistance, and second, a similar class of needy families who, because of recent arrival in the state, are ineligible for AFDC assistance.

The first issue thus presented to this Court is whether, in light of the purposes of federal and state welfare programs, such a classification is reasonable. *Mc-*

Laughlin v. Florida, 379 U.S. 184 (1964); *Carrington v. Rash*, supra. We contend that it is not.

The overall purposes of welfare legislation, whether federal or state, include public assistance to those in need, maintenance and strengthening of family life and the achievement of self-support and self-care. It is to us unquestioned that requiring an applicant to reside in a state for twelve months as a condition of eligibility for assistance, will serve not to promote the purposes of the legislation, but rather to erode those values the legislation attempts to advance. Circuit Judge Fahy, speaking for the three-judge District Court in *Harrell v. Tobriner*, 279 F. Supp. 22 (D.D. Col. 1967) noted this truth at page 27:

> "The spread over a year's time of the evils which public assistance seeks to combat may mean that aid, when it becomes available, will be too late. Too late to prevent the separation of a family into foster homes or Junior Villages; too late to heal sickness due to malnutrition or exposure; too late to help a boy from succumbing to crime."

In light of the fundamental purpose of welfare legislation—to provide assistance for members of the community who are in need—a provision which arbitrarily eliminates certain needy members of the community is constitutionally unreasonable. If a one-month resident is denied the assistance given a thirteen-month resident, although both are otherwise eligible, the newcomer is denied the equal protection of the law; such clearly different treatment has no reasonable relation to the basic legislative purposes.

The states however, argue that if the basic purposes are not served, still the residency requirement fulfills certain other valid needs. One argument made is that the requirement enhances the administrative effectiveness of the welfare program and is necessary for planning purposes. The evidence, however, simply does not support this contention. Welfare statutes contain many complex eligibility criteria and the elimination of the residency test would appear to reduce rather than increase the administrative work load. As the District Court in *Smith v. Reynolds*, 277 F. Supp. 65, (E.D. Pa. 1967) noted at page 68:

> "... all of the evidence is to the effect that many of the burdensome budgetary and administrative problems which are currently encountered by welfare officials in the conduct of the public assistance program would be substantially alleviated by the removal of this bottleneck in the processing of applicants."

Regarding predictability, it is noted that some states, including New York, have no residency requirement and they seem to be able to plan satisfactorily to meet welfare exigencies.

The states further argue that the residency requirement serves the legitimate state purpose of limiting the amount of money they must contribute to the AFDC program. Preserving the public purse may be a legitimate purpose in certain instances, but it is clearly impermissible to accomplish that end by arbitrarily singling out a class of persons to bear the entire burden. See, for

example, *Rinaldi v. Yeager*, 384 U.S. 305 (1966) where the Court held unconstitutional a New Jersey statute that allowed the state to withhold prison pay from unsuccessful appellants (to reimburse the county for the cost of their trial transcript) but which did not apply to those unsuccessful appellants who received a fine, a suspended sentence or who had been placed on probation. The Court said at page 309:

> "...We may assume that a legislature could validly provide for replenishing a county treasury from the pockets of those who have directly benefited from county expenditures. To fasten a financial burden only upon those unsuccessful appellants who are confined in state institutions, however, is to make an invidious discrimination."

A state could, to preserve funds, reduce further the payments made to all needy children to a level even below that which exists today; but failing that step backwards, there is no rational basis for imposing upon Appellee, her children, and other families in their class the total burden.

Further, the holding of the Court in *Edwards v. California*, 314 U.S. 160 (1941), bars a state from seeking to protect the public purse by excluding or hindering the entry of all nonresident indigents. In *Edwards*, the Court rejected the argument that the influx of poor migrants would impose severe costs on the state and held the statute to be an unconstitutional barrier to interstate commerce. While the residence requirements do not present as direct a barrier to commerce, it is significant that in *Edwards*, California's desire to protect its treasury did

not justify interference with the interstate movement of citizens. See, *Ramos v. Health and Social Services Board*, 276 F. Supp. 474, 477 (E.D. Wis. 1967).

The states contend additionally that a legitimate state interest exists in withholding public assistance from those citizen immigrants who arrive searching either for an initial grant or for a more favorable welfare climate. They argue first that such reasons for migrating ought not to be rewarded. Further, they argue that until the newcomers prove their intention to become permanent, contributing residents for purposes other than receiving aid, public assistance should be denied them.

Withholding aid in such a manner from all indigent newcomers creates however, a non-rebuttable presumption that every person applying for state help in their first year of residence is motivated to enter solely to obtain welfare. Such a presumption has no basis in fact. While it may be argued that *some* migrants choose a new home based entirely on welfare considerations, the overwhelming majority move for far different reasons. Some must follow employment; some, on doctors orders, move to a more healthful climate; and many, like Appellee in the instant case, and the plaintiff in the Texas case, migrate to be near relatives. But even assuming that many immigrants do base their choice of home on welfare considerations, and further assuming, without conceding, that the state can legitimately withhold welfare from such newcomers still the blunt method of attributing such economic purpose to *all* new arrivals cuts an unacceptably broad path of need.

A statute much less restrictive of human rights and much less discriminatory than residence requirements

could be drafted to select out those who enter a state solely to increase their government grant. Aid could be withheld from these few without denying assistance to many others who do not fit within the perimeters of the state's objection. See, Harvith, *The Constitutionality of Residence Tests for General and Categorical Assistance Programs*, 1966 Calif. Law Rev. 567.

Needy newcomers are no less needy because they are newly arrived. They are no less residents of the state because they have only recently begun to reside there, and they are no less entitled to enjoy the public welfare benefits of which every needy resident may partake simply because they have experienced their critical need soon after migrating to their new home. *Smith v. Reynolds*, 277 F. Supp. 65 (E.D. Pa. 1967).

The residency requirements of Texas and Connecticut create impermissible discriminations among residents in light of the purposes of federal and state AFDC legislation. Furthermore, the "legitimate" purposes of the classifications suggested by the states do not justify such unconstitutional discriminations.

POINT II

The residence requirements of both Texas and Connecticut interfere with the right of United States citizens to travel and settle in any state in violation of the United States Constitution.

Assuming logical behavior on the part of welfare recipients, residence tests for public assistance *prevent* the

interstate migration of persons unable to exist in their new home without immediate state aid. Further, residence tests *penalize* those indigents who do migrate for the fact of having moved interstate. It is the position of this brief that such statutory interference with the right of citizens of the United States to move about within the states is in violation of the United States Constitution.

Arguments supporting this contention may be based on several Constitutional provisions, including the Commerce Clause, the Privileges and Immunities section of Article IV, Section 2, clause 1, and the Privileges and Immunities Clause of the Fourteenth Amendment. It is not the intention of this brief to set out in detail all of the relevant arguments. However, a discussion of the major elements of such arguments is necessary in delineating the constitutional violation.

The case from which any analysis of welfare residence requirements and the freedom of movement must start, is *Edwards v. California*, 314 U.S. 160 (1941). There, a California statute, which made it a misdemeanor knowingly to bring a nonresident indigent into the state, was unanimously held unconstitutional. The five-judge majority relied on the Commerce Clause and held that the "statute must fail under any known test of the validity of State interference with interstate commerce." *Edwards*, supra at p. 174. Four justices concurring thought the state statute unconstitional because it infringed upon a freedom of interstate movement which they considered a privilege or immunity of a United States citizen guaranteed against state abridgment by the

Fourteenth Amendment. The majority did not find it necessary to reach that question.

In *Southern Pac. Co. v. Arizona*, 325 U.S. 761 (1945), the Court, in discussing the Commerce Clause stated at p. 767:

> "... ever since *Gibbons v. Ogden*, 9 Wheat, (U.S.) 1, the states have not been deemed to have authority to impede substantially the free flow of commerce from state to state, or to regulate those phases of the national commerce which, because of the need of national uniformity, demand that their regulation, if any, be prescribed by a single authority."

This attitude toward the Commerce Clause has been the position of the Court for many years. Further, the Court in *Edwards* specifically held that the constitutional definition of the word "commerce" included the transportation of persons. We are, therefore, left with no doubt regarding the protection the Commerce Clause offers for the interstate movement of people.

The states might argue that since *Edwards* dealt with a statute which *prohibited* migration, it has no applicability to the welfare residency requirements which "merely" place economic burdens on travel. However, the recent case of *United States v. Guest*, 383 U.S. 745 (1966) must be read as proscribing even the discouragement of interstate travel. In *Guest*, the Court upheld a paragraph of a federal indictment based on 18 U.S.C. 241 which outlaws conspiracy to interfere with rights or privileges secured by the Constitution. The relevant

paragraph alleged interference with and intimidation in the enjoyment of:

> "The right to travel freely to and from the State of Georgia and to use highway facilities and other instrumentalities of interstate commerce within the State of Georgia."

The Court explained that while there had been differences in emphasis on the Court as to the source of the constitutional right of interstate travel, "all have agreed that the right exists." The Court went on to say at p. 760:

> "If the predominant purpose of the conspiracy is to *impede* or prevent the exercise of the right of interstate travel, or to *oppress* a person because of his exercise of that right, then. . . the conspiracy becomes a proper object of the federal law under which the indictment in this case was brought." (Emphasis added)

It seems clear that the Court, by using the words "impede" and "oppress" intended to outlaw even the discouragement of the constitutional right.

Furthermore, two justices concurring in *Bell v. Maryland*, 378 U.S. 226 (1964) indicated their belief that state action is unconstitutional even if it merely hinders interstate movement. That case involved a Maryland trespass conviction for refusal to obey a racially motivated request to leave a restaurant. The Court reversed on other grounds, but Justices Douglas and Goldberg concurring, argued at p. 255 that the conviction was invalid state action violating the right to travel.

> "Is the right of a person to eat less basic than his right to travel, which we protected in *Edwards v. California*, 314 U.S. 160? Does not a right to travel in modern times shrink in value materially when there is no accompanying right to eat in public places?
>
> "The right of any person to travel *interstate* irrespective of race, creed or color is protected by the Constitution *Edwards v. California*, supra. Certainly his right to travel intrastate is as basic. Certainly his right to eat at public restaurants is as important in the modern setting as the right of mobility. In these times that right is, indeed, practically indispensible to travel either interstate or intrastate."

Of course, protections for the right of free movement can be found elsewhere in the Constitution. In *Edwards v. California*, supra, as noted above, four justices concurring in the result would have found that:

> "The right to move freely from State to State is an incident of *national* citizenship protected by the privileges and immunities clause of the Fourteenth Amendment against state interference." (at p. 178)

In other cases too this Court has restated that "freedom of movement is basic in our scheme of values." See *Crandall v. Nevada*, (U.S.) 6 Wall 35, 44 (1868); *Williams v. Fears*, 179 U.S. 270, 274 (1900); *Kent v. Dulles*, 357 U.S. 116 (1958); *Aptheker v. Sect'y of State*, 378 U.S. 500 (1964); *Zemel v. Rusk*, 381 U.S. 1 (1965).

There can be no doubt that an inevitable effect of welfare residency requirements, including those of Connecticut and Texas, is to deter indigents from moving between states and to penalize those who do. It is these effects which constitute an infringement of the freedom of movement in violation of the United States Constitution.

CONCLUSION

The order of the District Court for the District of Connecticut declaring the Connecticut AFDC residence requirement invalid, should be in all respects affirmed.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 9

BERNARD SHAPIRO, Welfare Commissioner of Connecticut,

Appellant,

—v.—

VIVIAN THOMPSON,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

No. 33

WALTER E. WASHINGTON, *et al.*,

Appellants,

—v.—

CLAY MAE LEGRANT, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

No. 34

ROGER A. REYNOLDS, *et al.*,

Appellants,

—v.—

JUANITA SMITH, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SUPPLEMENTAL BRIEF FOR APPELLEES ON REARGUMENT

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The facts are stated and the several questions of law fully argued in the separate briefs already filed by the Appellees in each of these three cases. We reaffirm those arguments without qualification. We should also remind the Court of the issues peculiar to individual cases, which are covered in the separate briefs, such as the claim that the Connecticut statute is unconstitutional because of its discrimination against persons from other States who "enter Connecticut without visible means of support for the immediate future." See Brief for Appellees in *Shapiro* v. *Thompson*, pp. 24-28.

The primary purpose of this Supplemental Brief is to summarize a single narrow theme running through all the cases—drawing the arguments together—that requires affirmance of the judgment in each.

Summary of Argument

I

These three cases challenge the Pennsylvania, Connecticut and District of Columbia laws establishing one-year-residence requirements for eligibility to receive public assistance under programs of aid to dependent children.[1] Because of this requirement each of the challenged statutes distinguishes between indigent adults—and also indigent children—whose situations are identical in every respect save prior residence. Those who satisfy the technical one-year-residence requirement are granted public assistance, while those who cannot meet the requirement are denied that essential aid. Abstractly stated, therefore, the question presented by all three cases is whether this discrimination on the basis of length of residence in a State violates the Fifth and Fourteenth Amendments.

But this abstract statement conceals the flesh, blood and heart of the true question. The facts of these cases make three points clear that frame—and limit—the constitutional issue:

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[1] All of the named plaintiffs in the three cases, except Vera Barley, were applicants for Aid to Families with Dependent Children. Mrs. Barley was an applicant for Aid to the Permanently or Totally Disabled. The decree in the Pennsylvania case enjoins enforcement of the residence requirements in all categories of public assistance: Aid to Families with Dependent Children, Aid to the Blind, Aid to the Permanently or Totally Disabled, Old Age Assistance, and General Assistance (Pa. App. 156a). The decree in the Washington, D.C. case enjoins enforcement of the requirement in all categories except Old Age Assistance (D.C. App. 89).

For convenience, we speak in the argument only of AFDC assistance.

First, the classification is in relation to the bare essentials of life, material and spiritual. Food, shelter, health, freedom from institutional confinement, and the preservation of families are at stake.

Second, those denied assistance under the length-of-residence classification have no less need for public assistance in order to obtain the bare essentials of life than those to whom assistance is available. From the standpoint of the stated purposes of public assistance laws, therefore, the two classifications are indistinguishable. Moreover, except for length of immediately prior residence, their situation is identical in every respect.

Such gross discrimination—in relation to fundamental human interests—between persons whose situation is identical in all relevant respects is alone enough to violate the Equal Protection Clause and the Due Process Clause of the Fifth Amendment, unless it bears a rational relation to some other, substantial legislative problem. The elementary character of the needs served by these assistance programs distinguishes them from other State grants. Before turning to the question of justification, however, we should point out that in the present cases a much narrower decision under the Equal Protection and Due Process Clauses will suffice.

For their third basic element is that the ground of the hostile classification is solely the exercise of a basic human liberty—freedom to leave an old and personally unsatisfactory environment in pursuit of preferred associations and opportunities for self-preservation or advancement. Freedom of geographic movement, within the Union, which is the underpinning of many rights, has long been recog-

nized as an essential aspect of personal constitutional liberty. Thus, this is not merely a case of discrimination upon capricious but otherwise neutral grounds; this classification interferes with basic constitutional rights. Discrimination upon such grounds is obviously more objectionable from a constitutional standpoint than discrimination upon grounds that are neutral but irrelevant.

Even so, we need not claim that the classification is unconstitutional *per se*. Conscientious examination of the alleged justifications for the length-of-residence classification in public assistance shows that the hostile discrimination among persons otherwise identically situated, solely on the basis of their exercise of liberty of movement, is not rationally related to any permissible State objective.

The case thus falls within the familiar principle that a classification which discriminates, without justification, against those who exercise a fundamental liberty violates the Equal Protection Clause and the Due Process Clause of the Fifth Amendment.

II

A decision invalidating the one-year-residence requirement would not involve overriding either section 402(b) of the Social Security Act, 42 U.S.C. 602(b), or an implied congressional judgment that the requirement satisfies constitutional standards.

First, section 402(b), properly understood, gives no affirmative sanction to one-year-residence requirements. It implies no congressional judgment upon their wisdom or constitutionality. The sole function of that provision is to raise a federal statutory barrier to residence require-

ments longer than one year. Section 402(b) leaves all questions concerning shorter residence requirements exactly where it found them—in the hands of the State legislatures subject to normal constitutional requirements and judicial review.

Second, section 402(b) would not be controlling even if it could be read as giving statutory authorization for a one-year-residence requirement. In that event, section 402(b), like D.C. Code, §3-203(a), would be unconstitutional for the same reasons as the State laws challenged herein. Congress has no power to abrogate or dilute the guarantees of Equal Protection and Due Process. To the extent that Congress must be taken to have expressed an implied judgment on questions of legislative fact in enacting D.C. Code, §3-203 (a), our constitutional argument necessarily challenges the rationality of those conclusions, just as it does in the case of the State legislatures. But, since D.C. Code, §3-203(a) is not national legislation, it is worth observing that no such judgment lies behind the basic provisions of the Social Security Act, including section 402(b). The history of the Social Security Act shows no legislative investigation or findings. Nor can any judgment or even a congressional estimate be presumed. Since Congress did not establish any residence requirement, it had no occasion to face up to the underlying facts and resolve the issue one way or the other, as it does when it leaves the States no choice or enacts directly operative legislation.

Consequently, the Social Security Act does not relieve the Court of the duty to reach its own judgment upon whether the discrimination worked by the one-year-residence requirement is a rational response to a substantial evil.

ARGUMENT

I.

The One-Year-Residence Requirement Violates the Equal Protection and Due Process Clauses by Discriminating, Without Justification, Between Persons Identically Situated in Relation to Fundamental Human Needs, Solely Because of the Exercise of Liberty of Geographic Migration.

A. The One-Year-Residence Requirement Works Gross Discrimination, in Relation to the Very Essentials of Life, Among Persons Whose Situation Is Otherwise Identical.

Appellants admit, as they must, that the Pennsylvania, District of Columbia, and Connecticut statutes differentiate, for the purpose of public assistance, between indigent adults—and also indigent children—who are identically situated in every respect except immediately prior length of residence within the jurisdiction.[2] Those who meet the one-year-residence requirement are granted public assistance. Those who moved into the jurisdiction within the year are denied assistance even though their situation is

[2] Both the Pennsylvania and District of Columbia statutes establish an unqualified one-year-residence requirement as a condition of eligibility for AFDC assistance. Pa. Stat. Ann. title 62, §§401, 432(6). D.C. Code, §3-203. The Connecticut statute is somewhat different because it disqualifies for one year only those residents who arrive in the State "without visible means of support for the immediate future." Conn. Gen. Stat., §17-2d. The difference seems irrelevant in terms of the argument presented in this Supplemental Brief. For the additional grounds on which the Connecticut statute can be attacked, see the brief previously filed for the Appellee in *Shapiro* v. *Thompson*, No. 9, at pp. 24-28.

otherwise indistinguishable. Abstractly stated, therefore, the question presented is whether the discrimination based upon length of residence violates the Fifth and Fourteenth Amendments.

But this abstract phraseology omits the simple human facts that establish the cruelty of the discrimination and frame the real constitutional question.

1. The classification is made in relation to the bare essentials of life, material and spiritual. Public assistance is the last resource of those unable to support themselves, unable to find family, friends or private institutions able and willing to provide support, and unable to qualify for old-age insurance, unemployment compensation or any other form of social insurance. For those who cannot satisfy the one-year-residence rule, the classification means deprivation of shelter, food, and clothing. When public assistance is withheld, the entire quality of life—sometimes even life itself—is placed in jeopardy. The present cases are no more severe than typical, but they dramatically illustrate the human consequences of the classification.

Juanita Smith had, when relief was denied, five children and was pregnant with a sixth. When she returned to her home in Pennsylvania, after living in Delaware, her father was employed and gave her financial assistance. When he was laid off, she became destitute. (Pa. App. 34a-36a.) Public assistance was granted under a misapprehension but then terminated solely because of failure to satisfy the one-year-residence requirement. (Pa. App. 37a, 74a.) A private charity could provide no more than temporary assistance. (Pa. App. 44a-46a.) At the time suit was brought, almost no family resources were available to maintain

Miss Smith and her five children. (Pa. App. 36a, 46a.) Although she "is pregnant and because of the numerous pregnancies she has developed terrible varicosities," she could not obtain the necessary medical care. (Pa. App. 49a.) Provision could be made for her five children but only by breaking up the family; the City Department of Public Welfare would place the children in child care centers overcrowded to 125 percent of capacity for periods of 90 days or two years while looking for foster homes. (Pa. App. 121a-125a.) The Director of Social Services for the Department testified (Pa. App. 123a)—

> I am saying to you that we would not in our department allow any child to go without shelter, and we would certainly take those children in, but I am saying that it is a very bad policy from the point of view of human value.

Were it not for the one-year-residence requirement, Juanita Smith and her children would have received public assistance.[8] Thus, in her case the classification operated in relation to shelter, subsistence, and the custody of her children. To children, it means the difference between overcrowded institutional upbringing—or at best a foster home—and the preservation of the family as a living unit. (Pa. App. 138a.)

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[8] The benefits sought and denied in these cases are penurious. In Pennsylvania, for example, by its own admission the State pays approximately 70 percent of its stated minimum requirements for health and decency, and 40 percent of the typical wage earner's expenditures. Pennsylvania Department of Public Welfare, *Public Assistance Allowances Compared with the Cost of Living at a Minimum Standard of Health and Decency* 1, 6 (1967). On the national pattern, see Report of the Advisory Council on Public Welfare, *Having the Power, We Have the Duty* 16-19 (1966).

Essentially the same cruel deprivations result from the length-of-residence classification in the other cases. Minnie Harrell had three children.[4] Attempting to recover from major surgery for cancer, lack of public assistance required her to live with her brother and sister-in-law, their six, and her three children in a four-bedroom apartment. Because public assistance was withheld, she too was faced with the necessity of surrendering her children for institutional care. (D.C. App. 11-12.)

Gloria Jean Brown's three youngest children were denied assistance despite their mother's eligibility, two because they joined her in the District of Columbia some months after her arrival there and one because his mother had lived in the district for less than one year when he was born. Gloria Jean Brown was required to spend all but $11.50 of the monthly assistance payment for herself and one eligible child on rent and food stamps for the family of five. Since she could no longer obtain support from relatives, she was faced with the commitment of her infant children to Junior Village. (D.C. App. 36-39.)

Clay Mae Legrant had two children at the time of suit, and was pregnant and arthritic. Living in a one-bedroom apartment in a condemned building, dependent for support on a sister (herself on public assistance) and a niece, the children were temporarily saved from commitment to Junior Village by the intervention of private charity. (D.C. App. 45-47.)

Jose Foster and her four children were forced by lack of public assistance to continue to share the three-bedroom house occupied by her brother-in-law and sister and their

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[4] Minnie Harrell has died since the appeal was taken.

six children. The brother-in-law's weekly income of $80–$90 was inadequate to purchase food for three adults and ten children and pay rent and utility bills. Under medical care requiring frequent visits to Temple University Hospital, Jose Foster lacked sufficient transportation money to keep many of her hospital appointments. (Pa. App. 141a-144a.)

Vivian Thompson had one son and was five months pregnant with another child when, because her mother could no longer support her, she was required to seek separate housing. A private agency was supplying aid for the duration of this litigation but she was otherwise entirely without means of supporting either her family or herself. (Conn. App. 40a, 44a.)

In the case of Vera Barley the classification on the basis of length of residence means—literally—the difference between freedom and confinement.[5] She moved to the District of Columbia in March 1941 and a month later she was committed to St. Elizabeth's Hospital for mental illness. She is now competent and doctors advise her release, but she cannot leave without public assistance because she is 67 years old and has no resources. Although she has been living in the District for 27 years and no other jurisdiction acknowledges any obligation for her welfare or subsistence, the District classifies her as a resident for less than a year because of her hospitalization. Thus, as a direct result of the length-of-residence classification, she is confined to a mental institution from which she could otherwise go free. (D.C. App. 21-22.)

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[5] Miss Barley's claim, unlike that of the other named plaintiffs, was for Aid to Permanently or Totally Disabled, but the one-year-residence requirement is the same. For the additional grounds of attack upon the District's interpretation of the requirement in this case, see D.C. Brief for Appellees, p. 7, n. 11.

The facts illustrated by the cases of the seven women and nineteen children before the Court are repeated in the lives of others in the classes these plaintiffs represent. In light of the grim reality, it seems hardly more than sardonic irony for counsel to argue that such arbitrary classifications as that in *Carrington* v. *Rash*, 380 U.S. 89, are distinguishable on the ground that there the disqualification was "permanent" (Conn. Brief for Appellants 13) while here "there is no permanent denial of welfare. If the person can get aid from their own family or aid from some charitable group for a one-year period, that person is eligible for welfare . . . ." (Conn. Brief 5.) One cannot so easily sweep out of sight the cruel and pervasive deprivations of a year of extreme economic poverty. Often other aid is not forthcoming for the year, as these cases illustrate. As lawyers, we are accustomed to dealing with discrimination in relation to relatively sophisticated rights, such as electoral disenfranchisement, freedom of religion and other civil liberties. The classification here is in relation to something simpler and more fundamental—the means of preserving a minimal existence and a family unit free of institutional care. The withholding of that basic assistance from a disfavored class manifestly erodes all other subtler and more sophisticated constitutional liberties.

We emphasize the point because it establishes one of the three important limitations upon the issue before the Court. These cases do not challenge all residence requirements upon eligibility for any form of State benefit. The public assistance at stake, including the AFDC grants, provides only the bare essentials of family existence without which other liberties are meaningless symbols.

2. The length of one's residence within a State is utterly irrelevant to the primary purpose of public assistance laws. Their central aim is to provide aid to the "needy and distressed . . . promptly and humanely . . . in such a way . . . as to encourage self-respect, self-dependency and the desire to be a good citizen and useful to society" (Pa. Stat. Ann. title 62, §401). In the case of families with children, there is the further aim to "maintain and strengthen family life" (Social Security Act, 42 U.S.C. 601). The one-year-residence requirement defeats these purposes. As the facts of these cases demonstrate, the need for those classified as ineligible under the length-of-residence test is no less than the need of those granted assistance. The withholding of assistance is no less a blow to their self-respect, social usefulness, and family life than in the case of long term residents.

3. In all other respects, except for length of residence, the appellees' situation is also indistinguishable from that of persons who receive public assistance. The sole basis of classification is length of residence.

On the basis of these facts a number of lower courts have held that the classification plainly violates the Equal Protection Clause until it can be justified by its relation to some other permissible legislative objective. Finding none, they invalidated the length-of-residence requirement. *Green* v. *Department of Public Welfare*, 270 F. Supp. 173 (D. Del.); *Thompson* v. *Shapiro*, 270 F. Supp. 331, 336-338 (D. Conn.) appeal pending as No. 9; *Smith* v. *Reynolds*, 277 F. Supp. 65 (E.D. Pa.); appeal pending as No. 34; *Harrell* v. *Tobriner*, 279 F. Supp. 22 (D. D.C.) appeal pending as No. 33; *Robertson* v. *Ott*, —— F. Supp. ——

(D. Mass.); cf. *Ramos* v. *Health and Social Services Board*, —— F. Supp. —— (E.D. Wisc.); *Johnson* v. *Robinson*, —— F. Supp. —— (N.D. Ill.).*

There is ample support for these rulings in established constitutional principles, as we have shown in our original briefs in the individual cases. See Briefs for Appellees in *Washington* v. *Harrell*, pp. 30-40 and *Reynolds* v. *Smith*, pp. 19-33. Although a State has wide powers of classification, "it is equally true that such classification cannot be made arbitrarily." *Gulf, C. & S. F. R. Co.* v. *Ellis*, 165 U.S. 150, 155. See also *McLaughlin* v. *Florida*, 379 U.S. 184, 190-191, where additional authorities are collected. "The courts must reach and determine the question whether the classifications drawn in a statute are reasonable in light of its purpose . . . ." *Carrington* v. *Rash*, 380 U.S. 91, 93. "[T]he ultimate test of validity is not whether the classes differ but whether the differences between them are pertinent to the subject with respect to which the classification is made." *Asbury Hospital* v. *Cass County*, 326 U.S. 207, 214. Although the principle condemning arbitrary classification was first developed in relation to regulation and taxation, later decisions demonstrate that it is equally applicable to classifications made by legislation conferring advantages and opportunities. *Commonwealth of Pennsylvania* v. *Board of Directors of City Trust*, 353 U.S. 230 (school for orphans); *Evans* v. *Newton*, 382 U.S. 296 (parks); *Simkins* v. *Moses H. Cone Memorial Hospital*, 323 F. 2d 959 (4th Cir.), cert. denied, 376 U.S. 938 (hospitals); *Carrington* v. *Rash*, 380 U.S. 95 (franchise); cf. *Sherbert* v. *Verner*, 374 U.S. 398 (unemployment benefits);

* Other cases in which temporary class-wide injunctions have been entered without opinion are cited in D.C. Brief for Appellees, p. 40.

see Reich, *The New Property*, 73 YALE L. J. 733, 779-782 (1964). And, as we show below, a length-of-residence classification of indigents living in a community, made for the purpose of granting or withholding the very essentials of life, is unreasonable because length of residence is not pertinent to the purposes of public assistance laws or any other permissible legislative objective. See pp. 20-38 below.

But this Court need not take such broad ground in order to affirm the judgments. The challenged classification not only relates to the fundamental essentials of life prerequisite to the enjoyment of personal liberties—food, shelter, clothing, and preservation of the family. The sole ground of the discrimination is the exercise of liberty of geographic movement, which is itself a fundamental aspect of constitutional freedom. Thus, the basis of the hostile classification in these cases is not merely irrelevant and therefore capricious; it deters or punishes the exercise of another interest long affirmatively recognized in constitutional law.

B. THE ONE-YEAR-RESIDENCE REQUIREMENT DISCRIMINATES AMONG PERSONS WHOSE SITUATION IS OTHERWISE IDENTICAL SOLELY ON THE BASIS OF THE EXERCISE OF A CONSTITUTIONALLY PROTECTED LIBERTY.

The inescapable effect of the one-year-residence requirement is to deter persons from moving into the State in order to establish a new residence with desired associations and opportunities or—where the deterrence was insufficient—to disadvantage them on account of their exercise of liberty of movement. This was the avowed purpose of the sponsors of the Connecticut statute (see Conn. Brief for Appellees, pp. 14-16), and the other States will

hardly deny that either deterrence or denial of the essentials of life is the inevitable consequence of the length-of-residence classification. In any event, the actual impact or "operative effect" is open to this Court's examination. *Reitman* v. *Mulkey*, 387 U.S. 369, 373 and cases cited. And, whether it operates as a deterrent or not, the very terms of the one-year-residence rule put its punitive consequences beyond dispute.

Liberty to move and take up a new residence in a new environment or to return to one's home after migration was a key element in our development as a free people. It was for this that men risked the Atlantic passage and undertook the westward journey. Conversely, the opportunity to seek a change in environment has, in fact, been jealously preserved.

Our constitutional law also recognizes the basic human right to geographic mobility in pursuit of preferred associations and opportunities. The kernel of one aspect of the right was expressed in Article IV of the Articles of Confederation, which guaranteed "the people of each state free ingress and regress to and from any other State." The Articles' exception for paupers and vagabonds was omitted in Article IV, Section 2, of the Constitution, which carried the basic theme a step further by declaring that "the Citizens of each State shall be entitled to all the Privileges and Immunities of Citizens in the several States." In *Corfield* v. *Coryell*, 4 Wash. C.C. 371 (Cir. Ct. E.D. Pa.) Justice Washington confined the privileges and immunities so conferred to those "which are, in their nature, fundamental" but included as fundamental the "right of a citizen of one State to pass through, or to reside in any other State, for purposes of trade, agriculture, professional pur-

suits, or otherwise." *Crandall* v. *Nevada*, 6 Wall. 35, struck down Nevada's effort to tax the movement of peoples across that bridge in the western journey, some justices relying upon the commerce clause and others on the very nature of the federal union. A prime purpose of the adoption of the privileges and immunities clause of the Fourteenth Amendment was to enable persons to move their residence where they please, within a State or to another State in the federal union "with the same rights as other citizens of that State." *Slaughterhouse Cases*, 16 Wall. 36, 80; cf. *Twining* v. *New Jersey*, 211 U.S. 78, 97. In *Edwards* v. *California*, 314 U.S. 160, the Court made it clear not only that there is constitutional freedom to move into a State in pursuit of preferred associations and opportunities, but also that the indigent have no less right of migration than the affluent. And in *United States* v. *Guest*, 383 U.S. 745 all members of the Court agreed that, regardless of the particular clause or concept to which it is traced, liberty to take up residence in whatever State one desires is an interest protected by the Constitution. We need show no more here because discrimination against the exercise of such an interest—unless justified by another objective of policy—would deny Equal Protection. See pp. 20-38 below.

The liberty of geographic movement involved in the present cases is much more than travel, although travel is involved. It is freedom to leave an old and personally unsatisfactory environment for new opportunities with a different home, different government, different economic or cultural opportunities, and different associations. In a nation founded by those who moved in search for political and religious liberty and which grew great through westward migration, it is hardly necessary to argue that change

of residence is the underpinning of other basic freedoms —personal, social, economic and political—many of which enjoy constitutional stature.

Three of the present cases illustrate the point concretely. Juanita Smith moved from Delaware to Pennsylvania to rejoin her family (*i.e.* freedom of association) (Pa. App. 36), to secure better education and job opportunities (*i.e.* personal and economic self-advancement) (Pa. App. 35-36), and to escape the vestiges of racial segregation (*i.e.* political and social equality) (Pa. App. 36). Freedom of association in the simple human sense of rejoining the family was the basic reason for the return of Gloria Jean Brown to Washington. She had been brought there as an infant, attended school there, and returned there to join her eldest child, her own father, her grandmother, her four sisters and two brothers. The two of the three minor children for whom she sues in this case had been left temporarily in Arkansas until she reestablished herself. She brought them to Washington in order to reunite the family (D.C. App. 35). Minnie Harrell, who has died since the appeal was taken, moved to Washington "so that I might be able to make a better life for myself and my children" and because "my children and I need to be together with my family very much." More specifically, she faced hospitalization and, if she moved to Washington, her children could be cared for by her brother and sister-in-law (D.C. App. 7).[1] If it be supposed that freedom of association is too pretentious a description for family relationships, we should recall that the integrity of family life "is something so funda-

[1] Quotations are from the plaintiff's Affidavit in Support of Motion for Preliminary Injunction, which is part of the original record in this Court.

mental that it has been found to draw to its protection the principles of more than one explicitly granted Constitutional right." Justice Harlan in *Poe* v. *Ullman*, 367 U.S. 497, 551-552.

In sum, discrimination in affording public assistance to indigents solely on the basis of length of residence seriously impinges upon the recognized constitutional liberty of moving to a new home in pursuit of preferred opportunities or associations.

It can be strongly argued that this interference with liberty of movement is enough to render the one-year-residence requirement unconstitutional. See Conn. Brief for Appellees, pp. 10-23. But here again the Court need not go so far. Nor is it necessary to determine whether the guaranty of freedom of movement to a new residence rests upon the privileges and immunities clause,[8] or is secured by the commerce clause[9] or the inherent character of the federal union,[10] or is an aspect of personal liberty protected by the Due Process Clauses of the Fifth and Fourteenth Amendments.[11] Decision here can be solidly rested upon the Equal Protection Clause in the case of the States and the similar guarantee against arbitrary federal discrimination under the Fifth Amendment. From this point of view, the central importance of the heavy

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[8] *Edwards* v. *California*, 314 U.S. 160, 177, 181 (concurring opinions).

[9] *Edwards* v. *California*, 314 U.S. 160; *Crandall* v. *Nevada*, 6 Wall. 35, 49 (concurring opinions).

[10] *Crandall* v. *Nevada*, 6 Wall. 35.

[11] Chafee, *Three Human Rights in the Constitution of 1787*, 192-193 (1956), quoted by Justice Harlan in *United States* v. *Guest*, 383 U.S. 745, 769, 770.

deprivations to which the one-year-residence requirement subjects those who move into a State is that it demonstrates that the resulting classification is not merely arbitrary and capricious because it discriminates upon irrelevant grounds among those who are otherwise identically situated, in relation to the most fundamental human needs, but is itself affirmatively harmful because it impinges upon the exercise of what all agree is a constitutionally-recognized aspect of liberty. Discrimination upon such ground is obviously more objectionable than discrimination upon grounds that are neutral but irrelevant.

Even so, we need not claim that the classification is unconstitutional *per se*. In these cases, conscientious examination of the alleged justifications shows that the hostile discrimination among persons otherwise identically situated, on the basis of their exercise of liberty of movement, is not rationally related to any permissible State objective.

C. The One-Year-Residence Requirement Bears No Substantial Relation to Any Permissible State Objective.

In the original briefs and oral argument of these cases considerable attention was directed to the standard of justification required to validate the length-of-residence classification. Because the classification (1) operates in relation to the bare essentials of life necessary to the enjoyment of other personal liberties and (2) is based solely upon the exercise of a constitutionally protected freedom, we have argued that the discrimination is to be judged not by the tolerant attitude applied to economic regulation but the stricter tests for invasion of human rights. See, *e.g.*, *McLaughlin* v. *Florida*, 379 U.S. 184, 190-192; *Loving* v. *Virgina*, 388 U.S. 1, 8; *Carrington* v. *Rash*, 380 U.S. 89,

96; *Harper* v. *Board of Elections,* 383 U.S. 663, 669-670; cf. *Griswold* v. *Connecticut,* 381 U.S. 479, 497, 501 (concurring opinions); *Bates* v. *Little Rock,* 361 U.S. 516, 525.

But while we believe that to be the proper standard, our case does not depend upon it. No more is required than that the Court be willing to look behind outmoded habits and prejudice against the poor, especially the poor in other localities, in order to ascertain whether there is any substance at all to the alleged relationship between the length-of-residence requirement and the various objectives which it is alleged to serve. For when reason is substituted for prejudice and empty assumptions, it becomes apparent that there is no rational relationship between the requirement and any permissible objective of legislative policy.

Careful judicial scrutiny of alleged relationships between an apparently invidious classification and permissible objectives of State policy has never been confined to instances of racial discrimination or special categories of cases. See, e.g., *Skinner* v. *Oklahoma,* 316 U.S. 535; *Carrington* v. *Rash,* 380 U.S. 89; *Rinaldi* v. *Yeager,* 384 U.S. 305; *Levy* v. *Louisiana,* 391 U.S. 68. Care in examining the assigned justification for the egregious discrimination involved in these cases is well warranted by its human consequences, by its relation to ancient local prejudices inconsistent with current reality, and by its impact upon a basic constitutional right. It is the more appropriate because the discrimination bears upon a class with scant influence upon the political process,[12] both because of its poverty and because many of its members come from other States.[13] But

[12] *United States* v. *Carolene Products Co.,* 304 U.S. 144, 152-153, n. 4.

[13] *South Carolina State Highway Department* v. *Barnwell Brothers,* 303 U.S. 177, 184-185, n. 2.

once the Court examines the facts there is no need to apply a heavier burden of justification or for the Court to substitute a judicial opinion for political judgment upon an issue where there is room for differing views. For length-of-residence classifications in granting public assistance necessary for the bare essentials of life are seen to serve no legitimate object of State policy when judged by any rational test.

Since each item in appellants' grab bag of justification is analyzed in detail in the original briefs, we merely summarize the points essential to the argument.

1. *To discourage the poor from entering the jurisdiction*

The actual reason for the one-year-residence rule is to discourage indigent persons from moving into the State. The purpose was squarely avowed by the sponsor of the requirement in the Connecticut legislation.

> If we pass this [one year residence] Bill, the word could get around that we are not an easy state . . . . As responsible legislators we cannot . . . continue to allow unlimited migration into the State, on the basis of offering instant money and permanent income to all who can make their way [here], regardless of their ability to contribute to the economy. [Connecticut General Assembly 1965, *House of Representatives Proceedings*, Vol. 11, Part 7, pp. 194-95 (Connecticut State Library); *Appendix to Plaintiff's Pretrial Memorandum in District Court*, pp. 78-80.]

Historical materials further demonstrating the purpose are contained in our original briefs. See Conn. Brief for Appellees, p. 16; D.C. Brief for Appellees, p. 45; Pa. Brief

for Appellees, pp. 21-22. Indeed, this objective is offered as justification by the District of Columbia (Brief 9), Connecticut (Brief 9-10), and by Judge Clairie, dissenting in the Connecticut case, Conn. App. 31a-35a; 270 F. Supp. 331, 339-41.

The short answer is that deterring the immigration of indigents is not a permissible object of State policy. The point was squarely determined by *Edwards* v. *California*, 314 U.S. 160. In a concurring opinion Mr. Justice Douglas declared that—

> to allow such an exception [curtailing the right of free movement of those who are poor or destitute] to be engrafted on the rights of *national* citizenship would be to contravene every conception of national unity. It would also introduce a caste system utterly incompatible with the spirit of our system of government.

And Justice Jackson observed that—

> Any measure which would divide our citizenry on the basis of property into one class free to move from state to state and another class that is poverty-bound to the place that it has suffered misfortune is not only at war with the habit and custom by which our country has expanded, but is also a short-sighted blow at the security of property itself.

Appellants' effort to distinguish *Edwards* on the ground that the California statute raised a direct bar against movement is ineffective. The penalty was aimed at those who assisted the immigration of an indigent person and thus operated only to discourage, not to bar, the indigents themselves. In any event, the form of the deterrence is

immaterial. Keeping indigents out of a State is simply not a permissible objective of State policy and a classification keyed solely to that objective violates the Equal Protection Clause. *Truax* v. *Raich*, 239 U.S. 33, 42.[14]

2. Investment in the Community

Appellees' argument that discrimination on the basis of length of residence is justified by a policy of limiting benefits to those who have an "investment" in the community or have made some "contribution" to it, is nothing more than a fictitious restatement of the ancient notion that each local community should care for its own and paupers should either remain in their place of settlement or go without relief.

The invalidity of that concept in a modern industrial nation characterized by economic unity and personal mobility is established by *Edwards* v. *California*, 314 U.S. 426. The converse of settlement is alienage. There is no room for alienage among free citizens of the federal union.

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[14] It may conceivably be suggested that, since *Edwards* v. *California*, *supra*, rests upon the commerce clause or the inherent nature of the national government, Congress has power to authorize the States to erect barriers to interstate migration and has exercised that power in section 402 of the Social Security Act. There are two answers: First, section 402 does not give affirmative congressional sanction for State one-year-residence requirements; it merely fails to prohibit them. See pp. 39-45 below. Second, Congress has no power arbitrarily to authorize State barriers to geographic migration without some justification other than the desire to prevent it, because such migration is an aspect of a liberty protected by the Fifth Amendment. Chafee, *Three Human Rights in the Constitution of 1787*, 192-193 (1956) quoted by Justice Harlan in *United States* v. *Guest*, 383 U.S. 745, 769, 770. A different question would be presented if either Congress or a State were to enact a carefully articulated program for dealing with the hardships of rural to urban migration or a similar problem. Here, we deal only with naked protectionism.

Words like "investment" and "contribution to the community" add only verbiage without foundation in fact. Public assistance programs are not geared to investment or contribution to the welfare of a State. They are not a form of insurance. Assistance is no less available to those who, through misfortune, have been charges upon the community throughout their lives than to those who have been normally productive. Nor is there a fragment of evidence to support the view that a year's residence has any tendency to measure relative contribution to a community. Fully 40 percent of the applicants rejected for failure to satisfy the one-year-residence requirement had had lengthy prior residence in the community that denied them assistance.[15] Their earlier contribution, before moving away, may well have equalled or exceeded the investment of persons who remained.

Perhaps the chimerical nature of the entire argument is best shown by the fact that in both the District of Columbia and Pennsylvania the one-year-residence requirement is applied to infants and other dependent children under AFDC programs even when their mother, by virtue of one year's residence, has made sufficient "contribution" to be entitled to aid. Surely, it will not be seriously suggested that the eight months old infant Shawn Brown made less "contribution" than other infants to the District of Columbia because he was born within a year of his mother's return to her home and family, or that when he becomes a year old and therefore eligible it will be because of his contribution to the community during his first year of life.

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[15] Pa. App. 84a-85a, 129a.

3. *To deter immigration by persons seeking more liberal assistance*

The most sophisticated version of the argument that a State may adopt a tough welfare policy towards indigents in order to discourage their movement into the jurisdiction asserts as its justification the desire to keep the State's program of assistance from attracting indigents from States with a lower level of available benefits.

The rationalization inevitably evokes skepticism. The States with one-year-residence requirements apply them to all indigents, even those who come from States where the level of benefits is higher than their own. States which have entered into reciprocal aid agreements waive the one-year-residence requirements even for persons coming from States with lower levels of benefits. Indigents are disqualified under the one-year-residence requirement for reasons utterly unrelated to movement in pursuit of higher benefits. Vera M. Barley was declared ineligible because she was committed to St. Elizabeth's within a year after coming to the District; Shawn Brown because he was born within a year of his mother's return to the District, even though she was entitled to aid. None of these practices is consistent with the contention that the aim of the classification is to keep the public assistance program from serving as a magnet.

Assuming that a State, regardless of the real motive, is entitled to the benefit of any rationalization counsel can supply, the argument nevertheless fails for three independently sufficient reasons:

First, it is inconsistent with *Edwards* v. *California*, 314 U.S. 160. The power of a State to shut indigent migrants

off from any advantages of its program of public assistance is no greater than its power to deny them access to other natural, social or political advantages of moving to the new residence. If New York may not regulate low-priced Vermont milk attracted to the New York market by her price regulation (*Baldwin* v. *Seelig,* 294 U.S. 511), then surely she may not exclude from her schools children of parents attracted by her superior system of public education. Similarly, Connecticut should not be permitted to discriminate against former residents of Massachusetts attracted by her program of public assistance.

Second, there is not the slightest bit of evidence to support the assertion that migrants are attracted from one State into another by differences in the level of public assistance. The argument of the briefs filed by appellants and amici rests entirely upon assertion. They cite no factual material to sustain it. Through constant repetition, the argument has gained a measure of popular and political credence, but more than widespread prejudice against a weak and unfortunate class is required to support the rationality of a discrimination, based merely upon the exercise of a basic human liberty, which operates to withhold the bare essentials of a decent existence. This is especially true where, as here, all the available data is directly contrary to the unsupported assumption.

The studies showing that welfare applicants do not migrate in search of higher benefits are discussed in the opinions below and in our original briefs, together with the testimony of State officials. See Pa. App. 84a-85a, 94a-95a, 98a (testimony of welfare officials); *id.* at 150a-151a, 154a, 277 F. Supp. at 66, 67-68 (opinion of District Court); D.C. Brief for Appellees, 50-52, n. 70 (reports of federal and

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State agencies, and of scholarly studies); D.C. App. 67-68, 279 F. Supp. at 29 (opinion of district court); Conn. Brief for Appellees, 8, 14-15, n. 15; Brief *Amici Curiae* of The Center on Social Welfare Policy and Law, et al. 22-30.

The evidence is dramatically confirmed by the facts of the instant cases. Juanita Smith's parents and their families are long-time residents, many of them natives, of Pennsylvania. She was born in an Army Hospital outside the State (Pa. App. 30a), but came to Pennsylvania at the age of one month, and remained until 1959 (*Id.* at 22a, 30a), when she went to Delaware with William Paynter, who is the father of her three younger children. In December, 1966, her father went to Delaware and urged the family to move to Philadelphia, offering to help them until William Paynter found work (*id.* at 34a). He paid the rent and utilities bills for several months, but Paynter was unable to find a job and returned to Delaware. When Miss Smith's father was himself laid off from work, his obligations to his own family (a wife and six children) left Miss Smith's children dependent. A month later, pregnant and sick, she sought assistance (*id.* at 34a, 36a). These facts are utterly inconsistent with any suggestion that Miss Smith went to Pennsylvania because of the lure of public assistance.[16]

[16] Despite these uncontradicted facts, stipulated by counsel (Pa. App. 22a) and found by the district court (*id.* at 137a), counsel for appellants has advised this Court that Juanita Smith first came to Pennsylvania in December 1966 (Pa. Brief 6). The inadvertent error seems characteristic of the "wishful thinking," conditioned by prejudice and hostility, which conceals the facts in this area. Compare the assertion by counsel for Connecticut that "appellee's claim of unavailability to work because of the age of her children . . . failed to satisfy the appellant" (Conn. Brief 5). It was expressly stipulated below that appellee was "unable" to work or seek work or work-training "because of her pregnancy and her responsibilities to her son" (Conn. App. 41a).

Jose Foster lived in Pennsylvania from 1953 to 1965. In 1965 (though receiving public assistance) she and her children went to South Carolina to care for her ailing grandparents. She remained there until her grandfather was hospitalized and her grandmother was taken in with another relative. She then returned to Philadelphia (Pa. App. 141-144a; Pa. Brief for Appellees, n. 5).

Minnie Harrell and her family had been living in New York where she received AFDC after her separation from her husband. When she fell seriously ill with cancer, she moved to the District of Columbia, the home of her brother and sister-in-law, because they could care for her children in the event she again required hospitalization (D.C. App. 7).

Vera Barley has been in the District of Columbia for 27 years. She is deemed ineligible for assistance only because she was hospitalized within a year of her coming back to the District in 1941, where she and her family had lived for a year-and-one-half in 1935 and 1936 (*id.* at 21).

We need not recite the history of the other plaintiffs. In each instance the facts demonstrate that they had ample personal reasons for moving without the slightest intention of obtaining more liberal public assistance in a new abode. In two instances, plaintiffs moved despite a reduction of benefits: Minnie Harrell from New York to the District of Columbia and Jose Foster from Pennsylvania to South Carolina (whence she later returned).

These concrete cases might be legally unimportant if they were only exceptions to a soundly based classification. Their significance here is that they concretely illustrate the emptiness of the invidious presupposition that

new residents applying for welfare must have come to a State attracted by its public assistance. The motivations and relationships disclosed by these records are confirmed by the general reports already mentioned, including a study introduced in evidence in the Pennsylvania litigation (and accepted by State officials and by counsel, Pa. App. 84a-85a, 129a), disclosing that 40 percent of the rejected applicants had previously lived in the State, that 60 percent had relatives there, and that 64 percent came to find work (37 percent having jobs when they came). Only 10 percent were recipients of assistance in the State from which they came. One-half of the applicants lived in Pennsylvania for six months prior to seeking assistance (Pa. App. 85a). See similar facts relating to other States in the Brief *amici* of The Center of Social Welfare Policy and Law, et al. 25-30.

We do not stress these facts for the purpose of persuading the Court to resolve in our favor a controverted issue upon which there is conflicting data. Such a choice is for the policy-making branch. Here, all the evidence—factual studies, expert opinion, and evidence of record—is on one side; on the other side is only prejudice and persistent assertion. The very purpose of the Equal Protection Clause is to resolve such conflicts on the side of reason. Something more than persistent prejudice, traceable to reluctance to support newcomers, is required to justify a classification that discriminates against the exercise of a basic human liberty, in relation to the availability of the bare essentials of existence.[17]

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[17] The difficulty of inducing legislatures to examine the facts in the face of persistent prejudice was explained to the district court in the Pennsylvania case (Pa. App. 96a-97a):

Third, the argument that the State is seeking to prevent its funds for public assistance from being dissipated by the attraction they offer to migrants from States with a lower level of benefits would not support the one-year-residence requirement, even if it were not otherwise invalid, because the discrimination is manifestly broader and more restrictive than is required to meet the asserted evil. The supposed danger cannot possibly excuse applying a one-year-residence to those who come from States with equal

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By Judge Kalodner:

Q. In view of the experience you have just recited to us, having been with the Department of Public Assistance a number of years, the last eight or nine years in the important office you occupy [Director of Bureau of Policies and Standards], has there been any representation made to the Legislature with reference to the elimination of the one-year-residence requirement by the Department of Public Assistance?

A. Yes, there has. We have proposed a change in the residence requirement on a number of times but the latest one is a proposal of one out of five years.

Q. Is what?

A. The person have a one year's residence out of five years.

Q. And what happened to that proposal?

A. It was turned down by the Legislature. It is being reintroduced this year, I understand.

By Judge Sheridan:

Q. Why hasn't the Department proposed the complete elimination of all residence requirements instead of coming to one of five? There must be a reason.

A. There is a lot of feeling I think about assistance to persons who haven't been residents of Pennsylvania and a fear that it will greatly increase costs, which you can't counteract by estimates.

Q. How would it increase cost? I think your testimony has been the opposite, hasn't it?

A. Yes, I know, but I am talking about the public opinion.

Q. My question is directed to the Department not the public.

A. Well, this is why the Department doesn't get its proposals enacted by the Legislature, because there is a pool of opinion that the residence requirements result in an influx of people into the Commonwealth.

or lower benefit levels. The problem if genuine, could be met in the case of migrants from States with a lower level of benefits by limiting the assistance to the levels of the States from which the migrants came. Thus, even if it be assumed *arguendo* that avoiding the attention of migrants seeking public assistance is a real and permissible objective of State policy, the flat one-year-residence rule is unconstitutional because less restrictive measures are patently sufficient to satisfy the need. *Aptheker* v. *Secretary of State*, 378 U.S. 500, 508; *NAACP* v. *Alabama*, 377 U.S. 288, 307; *Shelton* v. *Tucker*, 364 U.S. 479, 488.[18]

4. *To provide an objective test of residence*

It is common ground that a State may condition public assistance on "residence," in the sense that the beneficiary is living there with no intention of presently moving.[19]

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[18] It is apparent that the arguments made in the text apply equally to the Connecticut statute, which is somewhat narrower in scope but even more unmistakenly aimed at discouraging or penalizing the entry of those to whom it applies. Moreover, the seeming narrowness is wholly inadequate to render the statute an apt assertion of a desire to reach those entering the State to seek assistance, even if such an aim were permissible. The Regulations are set out in Conn. App. 9a-10a, and as the facts of this case plainly show, disqualify those conceded to have entered for bona fide reasons. Specifically, the distinction between those entering with a promise of a job and those entering with a credible expectation of finding work or of being supported by relatives renders the Connecticut statute far too broad to carry out the postulated purpose.

[19] Cf. Federal Handbook of Public Assistance Administration, Pt. IV, §§3620, 3651; Pa. Public Assistance Manual, §3151.11. The HEW regulations provide a simple test of residence requiring only presence without intention of presently removing. See D.C. Brief for Appellees, p. 34, n. 41. If a State were to discriminate against any resident within this definition by requiring presence for a period as a test of residence under the judgments in these cases, the Department would presumably disapprove that plan.

The reason, in our view, is that the AFDC and other forms of assistance involved in these cases are geared to the provision of a stable home, the opportunity to live a useful life in the community, and the preservation of the family unit. Grants are for biweekly or monthly periods. The type of public assistance appropriate for one passing through a locality or intending prompt departure might well be very different.

Appellants argue that since the present forms of assistance may be confined to residents, the one-year-residence rule is justified as a workable rule of thumb for determining who is a resident. The courts below uniformly rejected the argument. See Pa. App. 153a-154a, D.C. App. 70, Conn. App. 28a.

The rulings below upon this point are plainly correct. The one-year-residence rule would be a valid test of residence only if experience showed that there was a rational relationship between the fact observed and the conclusion to be inferred—between the fact that an applicant has not been in the State a full year and the conclusion that he is not presently living there with no intention to go away. Both logic and experience belie the inference. Certainly, one who has lived in a locality less than a year can be living there presently. And, the fact that one changed residence less than a year ago is no evidence that he intends to leave his current home. (Pa. App. 85a.) Even as a rebuttable presumption the one-year-residence rule would be too arbitrary a test of current residence to withstand constitutional examination. *Tot* v. *United States*, 319 U.S. 463.

Here again, the record furnishes dramatic examples of the fallacy of appellants' assertions. Gloria Jean Brown

was brought to Washington when she was an infant. She attended school there. Later, she left her first child there with her own father and went to Ft. Smith, Arkansas, with her mother. In February 1966, when her mother moved to Oklahoma in search of employment, Gloria Jean Brown went back to Washington. She considered Washington her home. She had lived there many years. Her father, her son, her grandmother, and her four sisters and two brothers were still living there. In August 1966, having reestablished herself, she sent for the two children whom she had left temporarily in Arkansas with their grandmother. In view of her background, family ties and arrangement for her children, no one could doubt the bona fides of her residence yet she was denied assistance until February 1967 because she had not been living in the District for the twelve preceding months. Even when she was granted assistance for herself and the oldest child, the next two were ruled ineligible because they had been residents for only six months. An infant born in Washington in November 1966 was also ruled ineligible because Gloria Jean Brown had not been a resident for a year prior to its birth. Manifestly, all three minor children had enduring ties to the District of Columbia and were residents by any rational test. (D.C. App. 35-36, Affidavit of Gloria Jean Brown in Support of Motion for Temporary Injunction filed as part of the original record in this Court.)

The case of Vera M. Barley further illustrates the arbitrariness of the one-year-residence rule as a test of actual residence. She had actually lived in the District for 27 years. The rule denied her public assistance solely because she had the misfortune to suffer a mental illness that re-

quired her commitment to St. Elizabeth's Hospital before she had been a resident for a year. No other jurisdiction acknowledges a relationship to her, and she has no place outside the District in which to live. Her planned arrangements to live in the District could not be pursued because public assistance was withheld. As a result, she would have been kept indefinitely in St. Elizabeth's but for the injunction below. (D.C. App. 21-22.)

Appellants' claim that so arbitrary a classification serves administrative convenience is also implausible. There are many familiar and more accurate criteria of actual residence than the one year rule. The suggestion that individual application would be a hardship is scarcely credible against the background of the actual administration of public assistance. *In every case* in which public assistance is sought, an exhaustive individualized determination is made of each relevant aspect of an applicant's life—except (we are told) his residence. The touchstone of the verification system by which need is established is individualized inquiry of a most painstaking and searching nature. In the process of that investigation all of the facts bearing on residence can readily be brought out, and often are, whether residence is in issue or not. In light of these realities of the public assistance system, abstract references to the "complex and difficult" questions involved in determining residence (D.C. Brief for Appellants, p. 10; cf. Judge Holtzoff, dissenting at D.C. App. 81) seem rather empty. Such a "remote administrative benefit" will not justify a discriminatory classification penalizing the exercise of a basic constitutional right. *Harman* v. *Forssenius*, 380 U.S. 528, 542; *Carrington* v. *Rash*, 380 U.S. 89, 96.

5. To prevent the fraudulent receipt of benefits from two States

Pennsylvania suggests that the one-year-residence requirement provides an "insulation period" necessary to prevent one recently moving from one State to another from obtaining benefits from both (Pa. Brief for Appellants, 15). This "justification" is adequately answered in the Pennsylvania appellees' brief at pp. 29-30. See, also, *Sherbert* v. *Verner*, 374 U.S. 398, 407.

We mention the argument here only because it shows how often the simple demands of decency and rationality are answered by defamation of the poor and dependent. The general fraud problem has consistently been shown to be minimal (see HEW study cited in Pa. Brief for Appellees at 29). Although there is absolutely no showing that the particular species of fraud suggested here has ever been practiced, appellants in the Pennsylvania case wish to tell the seven women now at the bar of this Court, and the class they represent, that their compelling claims must be postponed for up to a year in order to filter out other unproved claims of an anonymous group of unknown size supposed to be prone to file duplicate applications.

6. Facilitation of Budgeting[20]

Appellants' brief and Judge Kalodner's dissenting opinion in the Pennsylvania case argue that the one-year-residence requirement eases the problem of budgeting appropriations because it eliminates the need for predicting the number of persons entitled to relief who will move into the Commonwealth during the year. (Pa. Brief for Appellants, pp. 13-14; Pa. App. 163a-165a.) The speculation is dis-

[20] See also Pa. Brief for Appellees, pp. 26-29.

approved by the testimony of the Director of the Bureau of Assistance Policies and Standards that elimination of the residence requirement would not complicate budgeting (Pa. App. 95). It also contains obvious fallacies. Many States, including Pennsylvania until 1959, use two-year-budgets; in such cases the one-year-residence requirement could not eliminate any problem of prediction. Pennsylvania, like other States, waives the residence requirement under reciprocal agreements; reciprocity does not lessen any problem of prediction. In truth, any variation in the number of persons moving into a State during the year can have no more than trifling impact upon the need for public assistance in view of other larger variables affecting the state of the national and local economy. The total number of indigents affected by the residence requirement is no more than one or two percent of the total number who receive assistance. Changes in immigration into a State of the order of 10 or 20 percent could, therefore, affect the number receiving aid by only two-tenths of one percent.

7. *Protection of the fisc*

There is even less merit to the suggestion that the length-of-residence classification can be justified as a means of limiting discretionary expenditures. The desire to save money provides no rational basis for classification. It could equally well be cited as justification for withholding payments from a political or religious minority, or from those who exercise freedom of speech, or from any other group however capriciously defined. Thus, the argument based upon protection of the fisc is nothing more than a claim that hostile discrimination is permissible in the granting of benefits.[21]

[21] See also Pa. Brief for Appellees, pp. 24-25.

That contention, as we now show, is contrary to settled constitutional principles.

D. A Classification Which, Without Justification, Penalizes Those Who Exercise Constitutional Liberties by Discriminating in the Provision of Public Assistance Violates the Equal Protection and Due Process Clauses.

It is a well settled principle that a State cannot constitutionally condition the grant of an exemption, privilege, or other benefit upon the surrender of a constitutionally protected interest. *Speiser* v. *Randall*, 357 U.S. 513, 518-519; *Sherbert* v. *Verner*, 374 U.S. 398, 403-406.[22] Although the cases cited refer to other substantive constitutional guarantees, the same principle necessarily condemns as arbitrary, capricious, and therefore a violation of Equal Protection, a classification which discriminates, without other justification, solely on the basis of the exercise of such a constitutional liberty.

This is enough to invalidate the one-year-residence requirement in the Pennsylvania and Connecticut statutes. Both impose a hostile classification among persons otherwise identically situated solely upon their exercise of the constitutionally protected liberty of moving one's residence to another State in pursuit of preferred opportunities and associations. Both impose the discrimination in relation to provision of the bare necessities of life. The classification serves only prejudice against poor migrants; it has no rational relation to any permissible objective of State

[22] Additional authorities are collected in *Sherbert* v. *Verner*, *supra*, and in D.C. Brief for Appellees, p. 55.

policy. Consequently, both statutes violate the Equal Protection Clause of the Fourteenth Amendment.

In the case of the District of Columbia, the Fifth Amendment's guaranty of Due Process bars congressional establishment of invidious classifications based upon group prejudice without reasoned justification. *Bolling* v. *Sharpe*, 347 U.S. 497; *Schneider* v. *Rusk*, 377 U.S. 163. The District of Columbia residence requirement is therefore as invalid as those of the States.

II.

Section 402(b) of the Social Security Act Is Not Controlling.

A. Section 402(b) Gives No Congressional Sanction to One-Year-Residence Requirements for Public Assistance.

Section 402(b) of the Social Security Act, 42 U.S.C. 602(b) provides:[23]

> The Administrator [now the Secretary of Health, Education and Welfare] shall approve any plan which fulfills the conditions specified in subsection (a), except that he shall not approve any plan which imposes as a condition of eligibility for aid to dependent children, a residence requirement which denies aid with respect to any child residing in the State (1) who has resided in the State for one year immediately pre-

[23] Somewhat different partial restrictions upon durational residence requirements are applicable to Old Age Assistance, Aid to the Blind, and Aid to the Permanently and Totally Disabled. See 42 U.S.C. §§302(b), 1202(b), 1352(b), 1382(b).

ceding the application for such aid, or (2) who was born within one year immediately preceding the application, if the parent or other relative with whom the child is living has resided in the State for one year immediately preceding the birth.

Our attack upon the constitutionality of State one-year-residence requirements for AFDC assistance does not question the constitutionality of section 402(b), nor does that provision bear upon the constitutional argument. The central thrust of section 402(b) is to invalidate the once-common State laws limiting assistance to very long term residents. In the case of AFDC grants, Congress limited the federal statutory interdiction to plans establishing residence requirements in excess of one year. The most that can fairly be inferred with respect to shorter requirements is that Congress reached the conclusion that requiring residence for one year or less was not so objectionable that the federal statute should prohibit it. It cannot fairly be said that Congress gave affirmative approval to the one-year-residence requirement from the standpoint of either policy or constitutional law. Rather, it left the matter for other methods of resolution—to the States in the first instance but subject, like other State legislation, to constitutional review.

The legislative history proves the correctness of this interpretation. One year before the Social Security Act was enacted, 42 of the 47 States which had programs for aid to dependent children—all but five—required residence for more than the one year minimum permitted by section 402. Twenty-one States required residence for a stated period in a particular county or town. Thirteen States

required two years residence within the State; six required three years residence; one, four years; and one, five years. See Social Security Board, Social Security in America, 235-36 (1937) (published for the President's Committee on Economic Security).

There was a similar problem with respect to old age assistance. Of the 27 States with old age pension laws, eight had a 10 years-residence requirement; 16 required 15 years; two required 20 years; and Arizona required residence for 35 years. 79 Cong. Rec. 5602 (1935).

The entire purpose of section 402 was to insure that these unjust eligibility requirements would *not* be carried into State plans financed under the Social Security Act. Representative Doughton, in offering the Social Security bill on behalf of the House Ways and Means Committee, said (79 Cong. Rec. 5470 (1935)):

> These provisions are designed to liberalize the State laws. With the Federal Government bearing 50 percent of the cost, it is entirely appropriate that the States be required to modify their present long-residence requirements. These were perhaps necessary safeguards so long as the pensions were paid wholly from State funds, but they frequently cause considerable hardship and are unnecessary and unwise with 50-percent Federal support.

Both House and Senate Committee reports stated (S. Rep. No. 627, 74th Cong., 1st Sess. 35 (1935); H. Rep. No. 615, 74th Cong., 1st Sess., 24 (1935)):

> (b) Liberality of residence requirement: No residence requirement shall be imposed which results in the

denial of aid with respect to an otherwise eligible child, if the child was born in the State within the year, or has resided in the State for at least a year immediately preceding the application for aid. The State may be more lenient than this, if it wishes."[24]

Thus, Congress did not face the question whether any minimum period of residence should be required. And, since it did not face that question, Congress had no occasion to make any determination whatever as to whether a one-year-residence requirement is a proper response to problems of State concern and otherwise satisfies the requirements of the federal Constitution.

No inference of affirmative congressional sanction can be drawn from the recital that the Secretary "shall approve any plan which fulfills the conditions specified in subsection (a)." The word "shall," despite its literal generality, will not bear the weight of a conclusion disproved by the legislative history. Certainly, the language is not a command to approve a plan which is patently unconstitutional, merely because it literally satisfies the only conditions stated in subsection (a). Cf. *Simkins* v. *Moses H. Cone Memorial Hospital*, 323 F. 2d 959 (4th Cir.), cert. denied 376 U.S. 938. Congress cannot be taken to have commanded the Secretary to approve a plan which is racially discriminatory or which introduces an utterly capricious classification such as conditioning eligibility upon the month of the year in which a child was born. For the same reason, the Secretary acted properly when he, in fact, disapproved State exclusion of Indians, and of mothers with

[24] See, also, 79 Cong. Rec. 9268, 9285 (1935) and materials cited D.C. Brief for Appellees, pp. 56-57, n. 77.

illegitimate children.[25] At most, section 402(b) commands the Secretary not to add to the statutory conditions established by Congress administrative requirements *of his own creation* not related to the purposes of the statute or which Congress actually rejected. Such a mandate cannot be stretched into a congressional finding and judgment that no plan which satisfies those conditions is subject to constitutional attack, or that facts exist which justify all other State restrictions. The requirements of the Due Process and Equal Protection Clauses are to be read into section 402 as certainly as if they were incorporated expressly.

In the case of residence requirements, Congress came somewhat closer to the issue before the Court when it condemned residence requirements in excess of one year, but the same distinction governs. Congress left the shorter residence requirements untouched, without congressional approval or disapproval. Consequently, it had no more

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[25] On several significant occasions the Secretary, under the so-called "equitable treatment" doctrine, has disapproved State plans containing arbitrary eligibility restrictions not specifically interdicted by the Social Security Act. Thus, he has disapproved a State quota system which was racially discriminatory; State exclusion of Indians, or of mothers with illegitimate children, from public asistance; State denial of assistance because of an "unsuitable home," where no attempt is made to change the home environment or remove the child from it; and an arbitrary limitation on the kinds of former jobs which would qualify a family for assistance on the ground of the father's unemployment. See Note, 76 *Yale L. J.* 1222, n. 7 (1967), and references there cited. While the scope of this doctrine and the basis of the Secretary's authority to employ it are not entirely settled, it should be noted that the ruling regarding "suitable home" policies was ratified by Congress (42 U.S.C. §604(b) (1964); see Note, 76 *Yale L. J.* at 1224-25), and that regarding Indians was upheld in the single judicial decision ruling on the matter. *Arizona* v. *Ewing*, Civ. No. 2008-52 (D. D.C.), dismissal affirmed on jurisdictional grounds sub nom. *Arizona* v. *Hobby*, 221 F. 2d 498 (D.C. Cir.).

reason to express a judgment upon their constitutionality than upon any other constitutional question. The available evidence, as we have seen, rebuts the notion that Congress approved the wisdom, propriety, or constitutionality of the one-year-residence rule.

The distinction between congressional indifference and congressional sanction or approval has two important consequences in the present cases.

First, affirmance of the judgments leaves section 402 untouched. Nothing in the Social Security Act would be invalidated. Henceforth, the Secretary will withhold approval of State plans containing a one-year-residence requirement just as he would withhold approval of a plan which incorporated the separate-but-equal doctrine of *Plessy* v. *Ferguson*, acting upon the ground that section 402(a) is as much a mandate to comply with the Constitution as if its requirements were incorporated expressly. See *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 725.

Second, the conscious decision of Congress neither to disapprove nor to establish one-year-residence requirements carries no finding or presumption to which the Court should defer. Had Congress prescribed such a requirement for inclusion in State plans, that prescription would imply, under familiar constitutional principles,[39] that Congress had found either the federal government or the States to be facing one or more problems of some substance to which the one-year-residence requirement was an appropriate response. But when, as here, Congress expressed no opinion upon residence requirements of a year or less,

[39] *E.g.*, *Katzenbach* v. *Morgan*, 384 U.S. 641, 652-656.

there was no reason for it to make any judgment upon their wisdom, propriety, or constitutionality, or upon any of the underlying facts.

B. Section 402(b), Even If Read to Authorize One-Year-Residence Requirements, Would Not Control the Constitutional Issue.

If section 402(b) were to be read as affirmatively authorizing one-year-residence requirements, then it should be held unconstitutional for the same reasons as the State laws and provision of the District of Columbia Code challenged in these actions. Congress has "no power to restrict, abrogate or dilute these guarantees" of Equal Protection and Due Process (*Katzenbach* v. *Morgan*, 384 U.S. 641, 651, n. 10). Reaching that conclusion, however, would not involve any substitution of judicial judgment for a congressional finding made in the enactment of the Social Security Act upon matters of fact or questions of degree relevant to the constitutionality of the one-year-residence requirement.

In considering the Social Security Act, Congress made no determination that a one-year-residence requirement was an appropriate response to a social, economic, political, or administrative problem facing either the States or the federal government. The plain fact is that there is here no legislative finding upon the one-year-residence requirement; there was no investigation, there is no factual data or even a "congressional estimate." Even if it be assumed that Congress affirmatively authorized one-year-residence requirements, there is only "what can at most be called a legislative announcement that Congress believes a state law" to be permissible (*Katzenbach* v. *Morgan*, 384 U.S. 641, 651, 666, 669, Justice Harlan dissenting).

A mere declaration of permissibility will not support a presumption of congressional determination of any underlying legislative facts. When Congress imposes a requirement upon the States or enacts legislation directly operative upon persons subject to its jurisdiction, then it is obliged to come to grips with, and resolve, the matters of fact and question of degree determining the need for the legislation. Specifically, if Congress had prescribed a one-year-residence requirement for inclusion in State plans, that prescription might imply that Congress found either the federal government or the States to be facing one or more problems for which the one-year-residence requirement was an appropriate solution. Congress could not fairly enact such a provision without making some such determination, and a proper respect for a coordinate branch of government may require the judicial branch to assume that Congress has performed its function fairly. But when Congress, at the very most, only authorizes a State either to omit or impose the requirement, it has no need to come to grips with the underlying questions. On the contrary, since such federal legislation leaves the operative decisions to the States, Congress may also appropriately leave unresolved all questions concerning the need or justification for the legislation.

Here the issue of statutory construction discussed earlier merges with that of constitutionality, and the forced and artificial quality of the asserted problem of judicial deference to congressional findings implicit in section 402(b) is exposed. There has been no legislative determination to which the findings would be relevant. The entire discussion of the constitutionality of section 402(b) assumes the existence of congressional sanction that was never granted,

and it would be an intolerable compounding of fiction to go on to assume as well a legislative judgment justifying that sanction. The entire matter can be soundly avoided, with total fidelity to what in fact occurred, by holding that section 402 simply does not speak to the matter of residence requirements of one year or less.

D.C. Code, §3-203 is, of course, a direct congressional adoption of the one-year-residence requirement for the District of Columbia. The presumptions and standard of review are the same as in the case of the State laws; and we assert its unconstitutionality upon the same grounds. Like the State laws, however, any presumed congressional finding implicit in D.C. Code, §3-203 carries none of the added weight of basic national legislation.

Conclusion

The judgments below should be affirmed.

Respectfully submitted,

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September 1968

Certificate of Service

I hereby certify that a copy of the foregoing Supplemental Brief for Appellees on Reargument was mailed, postage prepaid, to Francis J. MacGregor, Assistant Attorney General, 99 Meadow Street, East Hartford, Connecticut, Counsel for appellant in No. 9, Richard Barton, Esq., Assistant Corporation Counsel, District Building, 14th and E Streets, N.W., Washington, D.C., Counsel for appellants in No. 33, and Edgar R. Casper, Deputy Attorney General, Department of Justice, Room 409, Finance Building, Harrisburg, Pennsylvania, Counsel for appellants in No. 34, this 3rd day of September, 1968.

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(39198)

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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1967

No. [redacted]9[redacted]

BERNARD SHAPIRO, Welfare Commissioner of Connecticut, *Appellant,*

v.

VIVIAN THOMPSON, *Appellee.*

No. [redacted]33

WALTER E. WASHINGTON, *et al.*, *Appellants,*

v.

MINNIE HARRELL, *et al.*, *Appellees.*

No. [redacted]34[redacted]

ROGER A. REYNOLDS, *et al.*, *Appellants,*

v.

JUANITA SMITH, individually, and by her, her minor children, *et al.*, *Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT, THE DISTRICT OF COLUMBIA, AND THE EASTERN DISTRICT OF PENNSYLVANIA, RESPECTIVELY

BRIEF OF THE CITY OF NEW YORK AS *AMICUS CURIAE*

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STANLEY BUCHSBAUM,
ROBERT C. DINERSTEIN,
of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 813

BERNARD SHAPIRO, Welfare Commissioner of Connecticut,
Appellant,

v.

VIVIAN THOMPSON,
Appellee.

No. 1134

WALTER E. WASHINGTON, *et al.*,
Appellants,

v.

MINNIE HARRELL, *et al.*,
Appellees.

No. 1138

ROGER A. REYNOLDS, *et al.*,
Appellants,

v.

JUANITA SMITH, individually, and by her,
her minor children, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT, THE DISTRICT OF COLUMBIA, AND THE EASTERN DISTRICT OF PENNSYLVANIA, RESPECTIVELY

BRIEF OF THE CITY OF NEW YORK AS *AMICUS CURIAE*

This brief is submitted by the City of New York as *amicus curiae* pursuant to subdivision 4 of Rule 42 of the Rules of this Court.

Interest of the *Amicus Curiae*

The City of New York by its Corporation Counsel, the authorized law officer thereof, has an essential interest in joining with the appellees in the above captioned cases to urge this Court to invalidate the statutes in question, which permit or prescribe a durational residence requirement for eligibility for aid to families with dependent children and other forms of public assistance under federally-aided programs.

New York State provides assistance under its Aid to Dependent Children and other social welfare programs to all eligible persons who reside in the state at the time application for assistance is made. *E.g.*, New York Social Services Law (formerly Social Welfare Law), §§349, 366 (52-A McKinney's Consolidated Laws of New York).

The unavailability in other states of such assistance for up to one year to persons otherwise eligible but for lack of sufficient residence, represents an arbitrary denial of rights, privileges and benefits conferred by federal law. Accordingly, New York City takes the position that neither the federal government nor a state may deny such assistance solely on the grounds of less than one year's residence.

Therefore, pursuant to Rule 42 of the Rules of this Court, the Corporation Counsel, on behalf of the City of New York appears as *amicus curiae* in support of appellees'

contention that the durational residence requirements in question violate the right of appellees under the Due Process and Equal Protection clauses of the Constitution.

POINT I

It is an invidious discrimination and, therefore, a violation of the Due Process clause of the Fifth Amendment for Congress to so limit or to allow the States to impose up to a one-year residence requirement on the distribution of funds furnished by the Federal Government for persons who are in need of the very essentials of life for survival.

Congress has determined that certain persons, not able to care for themselves, may receive from the state in which they live and shall receive from the federal government, subject to durational residence requirements, if any, of the states, at least sufficient aid to assure their survival. Such persons are defined in broad terms as the dependent children of needy families. These purposes and classifications are found in the preliminary statements of the appropriate sub-chapters of the Public Health and Welfare Law, 42 U. S. C., *e.g.* §§301, 601.

The federal government undertook the responsibility, through the Social Security Act, to aid these categories of needy persons. In establishing the AFDC program and in similar provisions, Congress decreed that, in every state participating in the program, poor persons of the described classes had a federal right to receive certain minimum assistance. Having assumed that obligation, neither the federal government nor the participating states may unreasonably deprive any member of such defined classes of those benefits. *Sherbert* v. *Verner*, 374 U. S. 398, 404 (1963). The arbitrary denial of such federal or state statutory

benefits by the states' durational residence requirements constitutes a denial of due process and the equal protection of the laws guaranteed by the Fifth Amendment and the Fourteenth Amendment. *Carrington* v. *Rash*, 380 U. S. 89 (1965). Similarly, denial by the federal government directly, through its legislation or indirectly by permitting the states to withhold those benefits, in combination with federal assistance, is a denial of due process of the law. *Bolling* v. *Sharpe*, 347 U. S. 497 (1954). Nor could congressional approval validate such an unconstitutional state legislative act. *Reynolds* v. *Sims*, 377 U. S. 533, 582 (1964).

Although appellants have argued that there are sound reasons for discriminating between long time residents and recent arrivals in bestowing benefits under federally-aided welfare programs, counsel for the appellees have vigorously demonstrated, not only that the stated purposes of the durational residence laws are unreasonable and unlawful, but that the states with such laws have failed to accomplish their objectives though persisting in their unreasonable discriminatory methods. See Supplemental Brief for Appellees at pages 22-42. For example, a 1959 study revealed that several states with durational residence requirements had higher increases in their AFDC caseloads than did New York City, during the same period. DUMPSON, *Are Residence Laws Necessary?* Minnesota Welfare 1-14 (Vol. II, No. 4, Winter 1959).

The New York City experience indicates further, the extent to which exclusionary devices like residence requirements fail to accomplish their aims. Three provisions of the New York Social Services Law set forth alleged safeguards against abuse of the state welfare laws. Section 139-a provides that a person becomes ineligible if local welfare office believes that the person in the State for six months or less has come to the State for the sole purpose of getting aid and an investigation confirms this suspicion.

Section 149 makes it a misdemeanor to bring an indigent person into New York State in order to make him a public charge. Finally, Section 121 says that, if a recipient has out of state relatives, he may be sent to join them if the "interest of the State and welfare of such person will be thereby promoted." The infrequency with which these statutes are invoked and the negligible number of cases, in comparison with the size of the program, in which the findings of violation are upheld indicate both the inadequacy of such laws in determining immigration of the needy and the relatively small number of persons coming to New York solely for its welfare benefits. See Office of Social Research and Statistics, New York State Department of Social Welfare (now Department of Social Services), Summary of operations under the "Anti-Abuse Law" (Research Brief #4, June 14, 1965); District of Columbia Brief for Appellees, pp. 49-51, n. 70; *Amicus* Brief, Center on Social Welfare Policy and Law, pp. 24-30.

It has been the policy of this Court in its recent decisions to dispose of legal distinctions that deprive persons of their constitutional rights. In scrutinizing the premises upon which such distinctions were built, this Court has not hesitated to look beyond stated purposes and rationale to see the real right or interest that the constitutional provision seeks to protect. This has been true in recent cases dealing with the Fourth Amendment right to be secure from unreasonable searches and seizures. The Court has dissolved the forty year old distinction between trespassory and non-trespassory intrusions in order to take account of modern, sophisticated methods of effecting a constitutionally unreasonable seizure. *Berger* v. *New York*, 388 U. S. 41 (1967); *Katz* v. *United States*, 389 U. S. 347 (1967). This Court has also sought to remove artificial distinctions applied to those places which are or are not protected from unreasonable searches. *Camara* v.

Municipal Court, 387 U. S. 523 (1967); *See* v. *City of Seattle*, 387 U. S. 541 (1967).

Similarly, in determining whether a particular class of persons is protected under the due process and equal protection clauses, this Court will take account of today's reality. The federal statutes and the policy of Congress underlying the various Social Security laws must be viewed in relation to a period of geographic and economic mobility unparalleled in our history. See *Amicus* Brief, Center on Social Welfare Policy and Law, *supra* at p. 23. Can it seriously be argued that Congress intended to exclude large numbers of Americans from participating in this mobility via an archaic poor law concept derived from Elizabethan times? *Id.*, at pp. 10-13 and appendix A; District of Columbia Brief for Appellees, nn. 59, 60. Furthermore, modern studies of population trends have disproved the historic justification for discrimination based on length of residence. See *Amicus* Brief, Center on Social Welfare Policy and Law, pp. 24-30; Connecticut Brief for Appellees, pp. 8-9.

The notion of length of residence as a condition is no longer considered consistent with the rights and privileges sought to be protected by social welfare laws. Nor is it congruent with the unlimited availability of other municipal services such as fire and police protection, medical and hospital care, mental treatment and hospitalization and subsidized housing. Equally important, such a notion is not consistent with more recent trends in federal legislation in this field.

State plans which include such arbitrarily administered durational residence laws specifically conflict with the requirements of recent amendments to the Social Security Act. For example in 42 U. S. C. §1396 there is provision for federal grants to the states for the purpose of provid-

ing medical assistance to needy families with dependent children and to the aged, blind or permanently disabled who are unable to afford medical services. Section 1396a (b) (3) specifically provides that the Secretary shall *not* approve any state plan under this program which imposes "any residence requirement which excludes any individual who resides in the State." How can this Court perpetuate an unconstitutional dichotomy in the same federal social welfare statute by permitting a factor totally unrelated to the purpose of that law to deprive a poor person of the minimum public assistance necessary for survival, but which then offers medical assistance to the poor unfortunate after the original denial of aid takes its toll on his health? It is against just such a confused and contradictory result that the due process and equal protection clauses were intended to guard. See *E.g., Rinaldi* v. *Yeager*, 384 U. S. 305 (1966); *McLaughlin* v. *Florida*, 379 U. S. 184 (1964). See also *Carrington* v. *Rash* and *Bolling* v. *Sharpe, supra.*

POINT II

It is a violation of the Due Process clause of the Fifth Amendment for Congress to provide for or to authorize the States to impose a durational residence requirement on the distribution of funds furnished by the federal government for the needy and thereby restrict or prohibit the travel of the poor to any part of the United States.

Not only do states with durational residence laws fail to accomplish their assigned purposes, but they are responsible for imposing a greater burden on states like New York which have no such laws. Insofar as residence laws are a deterrent to free choice in determining where to live, many poor persons are prevented, in effect, from moving

to the place of their first choice or to one which would otherwise afford them the greatest opportunity. For this reason such a person may settle in New York, or decide not to leave New York, even though he would have preferred to live somewhere else. This does not mean that such persons have come to New York just to be able to receive generous public assistance immediately. Rather, it indicates that a poor person usually must protect himself against the event that his job offer may fail to work out, that relatives may not be able to give promised assistance or that an unforeseen calamity may occur. The promise implicit in the Social Security Act is that, under such circumstances, he will be granted assistance. This promise remains unfulfilled because the federal government permits the states in a combined effort to deny this aid for up to a year.

The logic of the situation is borne out by the studies cited by appellees showing that a vast majority of persons applying for assistance within the first year of residence are those who did so only after a period of several months or who had not been receiving public assistance in the state from which they came. In other words, their situations had changed and, while they did not move in anticipation of becoming public charges, later events caused them to become such dependents.

To the extent that the federal government permits an unconstitutional condition such as a durational residence requirement to attach to its statutory grants of funds to the states, it helps to defeat the two principal objectives of the public assistance program. That assistance is intended to help a needy person survive until he can become self-sustaining and to permit the rehabilitation of the poor by providing aid while they learn a trade, go to school or overcome a temporary setback.

In a nation which has elevated the privilege to move freely throughout the land to a constitutional right of

national citizenship; it is unthinkable that the policy of the federal government continues to be responsible for limiting this freedom. See *Crandall* v. *Nevada*, 73 U. S. 35 (1867); *Edwards* v. *California*, 314 U. S. 160 (1941). Congress has wisely enacted legislation to enable the poor to share in the rights and privileges of other citizens, but it is incredible that it should permit federal funds granted for this purpose to be used so as to limit the right to move freely from one state to another.

As the experience of most states indicates, it is not unreasonable to expect that a person, especially if he has limited resources, will be deterred from going to a state which presents the greatest opportunity to him if he fears that, for up to a year, he may be without help should circumstances make it necessary for him to seek it. Such a possibility is no less remote than the one in which this Court said *Dombrowski* v. *Pfister*, 380 U. S. 479, 486 (1965):

> "A criminal prosecution under a statute regulating expression usually involves imponderables and contingencies that themselves may inhibit the full exercise of First Amendment freedoms . . . . When the statutes also have an overbroad sweep, as is here alleged, the hazard of loss or substantial impairment of those precious rights may be critical. For in such cases, the statutes lend themselves too readily to denial of those rights."

The distortion of the national patterns of population movement and of mobility of persons in our country, the threat to the future of millions of persons, the denial of equal protection and due process caused as they are by overly broad and oppressive state legislation combined with federal permissiveness in the use of federal funds in support of such action, are no less threats to be pro-

tected against than the "chilling effect" on the exercise of First Amendment freedoms in *Dombrowski*.

If the federal government is going to use the states as instruments for disbursing federal revenues for the benefit of people of the United States, it is intolerable that the federal government can permit the states to discriminate unreasonably among persons in the class of those which it intended to help. Just as the states are prohibited by the Equal Protection Clause from denying to persons on the arbitrary basis of length of residence, a statutory right, the federal government is similarly prohibited. This Court has held that federal action which results in the unreasonable deprivation of an individual's rights is in contravention of the due process clause of the Fifth Amendment. This was so determined because that clause is derived from the same basic concepts which prevent discriminatory state action. *Bolling* v. *Sharpe, supra.*

The federal program favors those states which participate in invidious discrimination against the poor by their durational residence requirements in the allocation of federal funds. Such states are permitted to thwart the primary purpose of the federal statute, shift part of their responsibilities to other states, deny basic rights to many of their underprivileged citizens through unconstitutional restrictions, and still obtain the benefits of federal monies.

The only adequate and complete solution to both the legal and social problems created by a welfare program that perpetuates unconstitutional devices like durational residence requirements, must be provided by the Congress, not this Court. Such a statutory resolution of a problem which is now of national, rather than local scope, may at some time include the elements recommended by the National Advisory Commission on Civil Disorders of:

a. Minimum, uniform standards of eligibility for, and amount of, assistance.

b. Variations in payments, above the minimum based on local cost of living factors, or higher state funding for other reasons satisfactory to the state involved.

c. Full funding by the federal government.

d. Elimination of unreasonable classifications and categories of assistance.

Report of the National Advisory Commission on Civil Disorders, pp. 461-467.

However, in the interim this Court can require the elimination of the unconstitutional elements of the present federally aided welfare programs. The decision in *Smith* v. *King*, 277 F. Supp. 31 (D. Ct., Ala. 1967), represents one such action. Striking down unconstitutional durational residence laws or the federal laws permitting such discrimination, especially in combination with the use of federal funds, is another.

CONCLUSION

The judgments of the Courts below should be affirmed.

October 8, 1968.

Respectfully submitted,

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In the Supreme Court of the United States

October Term 1968
No. 34

ROGER A. REYNOLDS, MAYER I. BLUM, HERBERT R. CAIN, JR., KATHERINE M. KALLICK, ROSALIE KLEIN, ALFRED J. LAUPHEIMER, EDWARD O'MALLEY, JR., NORMAN SILVERMAN, JULIA L. RUBEL, Constituting the Philadelphia County Board of Assistance, WILLIAM P. SAILER, Its Executive Director, MAX D. ROSENN, Secretary of the Department of Public Welfare of the Commonwealth of Pennsylvania, WILLIAM C. SENNETT, Attorney General of the Commonwealth of Pennsylvania,

Appellants

v.

JUANITA SMITH, Individually, and by Her, Her Minor Children, JOHN SMITH, TABITHA MILLER, SOPHIA PAYNTER, WILLIAM PAYNTER, VONCELL PAYNTER, and on Behalf of All Others Similarly Situated

and

JOSE FOSTER, Individually, and by Her, Her Minor Children, JEANETTE FOSTER, ANNIE BEA FOSTER, WILLIAM FOSTER, FRANCES FOSTER,

Appellees

On Appeal from the United States District Court for the Eastern District of Pennsylvania

SUPPLEMENTAL BRIEF FOR APPELLANTS ON REARGUMENT

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INTRODUCTION

The Supplemental Brief for Appellees purports to draw together for Cases No. 9, No. 33, and No. 34[1] the arguments originally presented to the Court separately by the various appellees.

Section I of the Brief restates the arguments previously presented to support the conclusion that the one-year residence requirement for public assistance violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. Appellants have fully argued their position supporting the opposite conclusion in their original brief to this Court, and here reaffirm the arguments and conclusions therein set forth.

Section II of Appellees' Supplemental Brief argues that there is no congressional authorization to the states for the durational residence requirements in question. Appellants will show that this is categorically false. Appellees further argue that if there is such congressional authorization, it has no significance for these cases. Appellants will show that Congress has repeatedly and specifically authorized the states to impose durational residence requirements and that this has the following impact on these cases:

---

[1] *Shapiro v. Thompson*, No. 9; *Washington et al. v. Legrant et al.*, No. 33; and *Reynolds et al. v. Smith, et al.*, No. 34.

(1) The state law providing for durational residence requirements in accordance with federal law cannot be validly attacked as unreasonable;

(2) The state law cannot be struck down without a holding that the federal law, pursuant to which the state law was enacted, is unconstitutional.

SUMMARY OF ARGUMENT

The Pennsylvania state law imposing a one year residence requirement for public assistance was enacted pursuant to specific authorization therefor in federal law.

The classification between persons who have, and persons who have not, resided in Pennsylvania for one year cannot be unreasonable within the meaning of the Equal Protection Clause of the Fourteenth Amendment to the U. S. Constitution where Congress has expressly authorized the states to establish such classification. It cannot be unreasonable for the states to do what Congress has specifically authorized them to do.

The classification in the state law can only be held unreasonable derivatively, that is, to the extent that the federal statutory authorization is unreasonable.

Therefore, the constitutionality or unconstitutionality of the state law is contingent upon the constitutionality or unconstitutionality of the parent federal law.

ARGUMENT

THE CONGRESSIONAL AUTHORIZATION TO THE STATES FOR DURATIONAL RESIDENCE REQUIREMENTS FOR PUBLIC ASSISTANCE NEGATES THE ARGUMENT THAT IMPOSITION OF SUCH RESIDENCE REQUIREMENTS BY THE STATES IS ARBITRARY, CAPRICIOUS OR UNREASONABLE

A. Congress, by Section 402(b) of the Social Security Act, Has Authorized the States To Impose a Residence Requirement of Up to One Year in Duration With Respect to the AFDC Program

Congress has repeatedly and in specific terms authorized the states to impose durational residence requirements for the federal-state public assistance programs.

For aid to families with dependent children (AFDC), Congress has specifically authorized the states to impose a residence requirement of up to one year:

Section 402 of Title IV of the Social Security Act, as amended, provides, *inter alia:*

> (b) The Secretary shall approve any plan which fulfills the conditions specified in subsec-

> tion (a) of this Section, except that he shall not approve any plan which imposes as a condition of eligibility for aid to families with dependent children, a residence requirement which denies aid with respect to any child residing in the State (1) who has resided in the State for one year immediately preceding the application for such aid, or (2) who was born within one year immediately preceding the application, if the parent or other relative with whom the child is living has resided in the State for one year immediately preceding the birth.
>
> 49 Stat. 627 (1935), as amended, 42 U.S.C. §602(b).

Congress has included the following provisions with regard to the allowance of residence requirements under the other categorical assistance programs embodied in the Social Security System. For Old Age Assistance, Aid to the Blind, and Aid to the Disabled, Congress has specifically authorized a residence requirement of up to five during the last nine years as well as up to one year immediately preceding application:

Old Age Assistance (Title I):

Section 2 of Title I of the Social Security Act, as amended, provides,

> (b) The Secretary shall approve any plan which fulfills the conditions specified in subsection (a) of this Section, except that he shall not approve any plan which imposes, as a condition of eligibility for assistance under the plan—

(2) any residence requirement which (A) in the case of applicants for old-age assistance, excludes any resident of the State who has resided therein five years during the nine years immediately preceding the application for old-age assistance and has resided therein continuously for one year immediately preceding the application.

. . .

49 Stat. 620 (1935), as amended, 42 U.S.C. §302(b)(2).

Aid to the Blind (Title X)

Section 1002 of Title X of the Social Security Act, as amended, provides,

(b) The Secretary shall approve any plan which fulfills the conditions specified in subsection (a) of this Section, except that he shall not approve any plan which imposes, as a condition of eligibility for aid to the blind under the plan—

(1) any residence requirement which excludes any resident of the State who has resided therein five years during the nine years immediately preceding the application for aid and has resided therein continuously for one year immediately preceding the application . . . .

49 Stat. 645 (1935), as amended, 42 U.S.C. §1202(b)(1).

Aid to the Disabled (Title XIV)

Section 1402 of Title XIV of the Social Security Act, as amended, provides,

(b) The Secretary shall approve any plan which fulfills the conditions specified in subsec-

tion (a) of this Section, except that he shall not approve any plan which imposes, as a condition of eligibility for aid to the permanently and totally disabled under the plan—

(1) any residence requirement which excludes any resident of the State who has resided therein five years during the nine years immediately preceding the application for aid to the permanently and totally disabled and has resided therein continuously for one year immediately preceding the application . . .

64 Stat. 555 (1950), as amended, 42 U.S.C. §1352(b)(1).

Aid to the Aged, Blind, or Disabled (Title XVI)

Section 1602 of Title XVI of the Social Security Act, as amended, provides,

(b) The Secretary shall approve any plan which fulfills the conditions specified in subsection (a) of this Section, except that he shall not approve any plan which imposes, as a condition of eligibility for aid or assistance under the plan—

(2) any residence requirement which (A) in the case of applicants for aid to the aged, blind, or disabled excludes any resident of the State who has resided therein five years during the nine years immediately preceding the application for such aid and has resided therein continuously for one year immediately preceding the application. . .

76 Stat. 200 (1962), as amended, 42 U.S.C. §1382(b)(2).

Federal grant programs under Titles I, IV and X were established by the Social Security Act of 1935. Authorization of limited durational residence requirements under these categories was recommended by the President's Committee on Economic Security,[2] and embodied in both the original House[3] and Senate[4] versions of the Act. The programs under Title XIV and Title XVI were added in 1950 and 1962, respectively, each authorizing durational residence reports from the outset.

This shows clearly that Congress knew what it was doing; time and again it specifically authorized the states to impose for the different programs such durational residence requirements as it deemed reasonable.

Furthermore, with respect to medical assistance for the aged and the subsequent medical assistance programs, Congress specifically prohibited the states from imposing durational residence requirements, showing clearly that when Congress wishes to exclude such provisions, it does so in unmistakable terms.

Those programs dealing with medical assistance, established in 1960 (Title I), 1962 (Title XVI), and 1965 (Title XIX), forbid the imposition of any durational residence requirements; thus indicating that

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[2] See Hearings on H.R. 4120 before the House Committee on Ways and Means, 74th Cong., 1st Sess., 41,161 (1935) Aid to the blind under Title X was first introduced in the Senate version of the Social Security Bill. See S. Rep. No. 627, 74th Cong., 1st Sess. (1935).

[3] H. Rep. No. 615, 74th Cong., 1st Sess. 1935.

[4] S. Rep. No. 627, supra.

when Congress wishes to exclude such provisions, it does so in unmistakable terms.

Medical Assistance for the Aged (Title I and Title XVI)

Section 2 of Title I and Section 1602 of Title XVI of the Social Security Act, as amended, provide,

> (b) The Secretary shall approve any plan which fulfills the conditions specified in subsection (a) of this Section, except that he shall not approve any plan which imposes, as a condition of eligibility for assistance under the plan—
>
> (2) any residence requirement which . . . (B) in the case of applicants for medical assistance for the aged, excludes any individual who resides in the State . . . .

49 Stat. 620 (1935), added by 74 Stat. 987 (1960), as amended, 42 U.S.C. §302(b)(2); 76 Stat. 200 (1962), as amended, 42 U.S.C. (1382) (b)(2).

Medical Assistance (Title XIX)

Section 1902 of Title XIX of the Social Security Act, as amended, provides,

> (b) The Secretary shall approve any plan which fulfills the conditions specified in subsection (a) of this Section, except that he shall not approve any plan which imposes, as a condition of eligibility for medical assistance under the plan—

> (3) any residence requirement which excludes any individual who resides in the State . . . .
>
> —79 Stat. 349, 42 U.S.C. §1396a(b)(3) (Supp. I, 1965).

No amount of rhetoric can disguise the fact that Pennsylvania's one-year residence requirement for public assistance is clearly and expressly authorized by Congress.

Appellees argue that the maximum period allowed for such residence requirements by Congress is less than many states had previously provided for under their own programs; that the manifest congressional intent was thus to cut down, rather than impose, durational residence requirements. And that, accordingly, the legislation in question represents a limitation on, rather than an authorization to, the states.

These terms have no mutually exclusive significance. Whatever is within the confines of a limitation is authorized. Moreover, if indeed Congress was concerned about the unreasonableness of existing residence requirements, it squarely faced the question of reasonableness by including the Social Security Act provisions in question. And it resolved that issue by unequivocally providing, with respect to AFDC, that a residence requirement of up to one year would not be unreasonable.

Appellees contend that, "No inference of affirmative congressional sanction can be drawn from the recital that the Secretary 'shall approve any plan which fulfills the conditions specified in subsection (a).' The word 'shall', despite its literal generality, will

not bear the weight of a conclusion disproved by the legislative history."

Since legislative history is resorted to only to resolve ambiguities in statutory provisions, there is no basis here for looking beyond or behind the statutory provisions themselves. Nothing on the face or in the context of these provisions mars the clarity of the term "shall". It imposes a mandate on the Secretary to approve state plans that fulfill the stated conditions and do not exceed the stated residence requirements.

Moreover, the excerpts of legislative history quoted by Appellees do not support their proposition:

79 Cong. Rec. 5470 (1935):

> These provisions are designed to liberalize the State laws. With the Federal Government bearing 50 percent of the cost, it is entirely appropriate that the States be required to modify their present long-residence requirements. These were perhaps *necessary safeguards* so long as the pensions were paid wholly from State funds, but they frequently cause considerable hardship and are unnecessary and unwise with 50 percent Federal support.

S. Rep. No. 627, 74th Cong., 1st Sess. 35 (1935); H. Rep. No. 615, 74th Cong., 1st Sess. 24 (1935):

> (b) Liberality of residence requirement: No residence requirement shall be imposed which results in the denial of aid with respect to an otherwise eligible child, if the child was born in the State within the year, or has resided in the

> State for at least a year immediately preceding the application for aid. The State may be more lenient than this, if it wishes. See, also, 79 Cong. Rec. 9268, 9285, and materials cited D.C. Brief for Appellees, pp. 56-57, n. 77.

These passages clearly reflect the view that residence requirements within the limits prescribed by the Social Security bill would be reasonable and appropriate.

Appellees contend that, "Certainly, the language is not a command to approve a plan which is patently unconstitutional, merely because it literally satisfies the only conditions stated in subsection (a) .... Congress cannot be taken to have commanded the Secretary to approve a plan which is racially discriminatory or which introduces an utterly capricious classification such as conditioning eligibility upon the month of the year in which the child was born."

This argument is entirely irrelevant to the issue before the Court. Appellees are not challenging some state-invented classification not anticipated by Congress, but a durational residence requirement expressly authorized by the Social Security Act.

B. The Congressional Authorization of Durational Residence Requirements Is a Significant Factor in Assessing the Reasonableness of Such Requirements

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States cannot be validly accused of acting arbitrarily or capriciously when they act clearly in accordance with a specific authorization of federal law. The

Commonwealth of Pennsylvania, anxious to participate in a federally funded program, can hardly be expected to make an independent determination as to the constitutionality of the federal law. Within our federal system, the duty to interpret the federal constitution and to act within its limits rests first upon Congress. Even this Court, charged with the power to review congressional enactments for compliance with the Constitution, accords those enactments a presumption of constitutionality. *Flemming v. Nestor*, 363 U.S. 603, 611. Surely state legislatures, in the absence of court decisions to the contrary, must accord congressional enactments the highest respect. It follows that state conduct within the scope of federal law cannot, in good conscience, be attacked as unreasonable without putting the federal law itself in question.

Appellants fully appreciate Appellees' attempts to persuade this Court to make new law by expanding the constitutional requirements, but Appellants find it difficult to understand Appellees' argument that the state law imposing a durational residence requirement can be struck down, while the federal law authorizing such legislation may be held to comply with the requirements of the Constitution.[5]

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[5] As a practical matter, such a result would place the federal administrator in the incongruous position of confronting an unconstitutional state plan which, in the clear language of Section 402(b), he "shall approve". If he disapproves the plan on the basis of the Court decision striking down the state legislation, he in fact takes upon himself the responsibility of concluding that the authorization contained in Section 402(b) has no legal validity. That is, he would construe the Court decision as striking down the federal as well as the state legislation.

Indeed, Appellees' "single narrow theme" running through all these cases is, of course, rather broad. The argument is, in effect, that where a state chooses to mount a program for its needy residents, it must do so for *all* its needy residents and is constitutionally barred even from defining residence durationally or otherwise restrictively.

Surely the logic of this argument hits the nerve centers of the entire categorical structure of the Social Security Act. If Congress chooses to mount a program to subsidize state programs for the needy, must this not extend to all the needy? If, in a basic needs program, all disqualifying classifications unrelated to actual need are invidious and barred by the equal protection clause, what of the needy who fall outside the federal categorical regime? Persons under 65, not blind or disabled, and who do not belong to families with dependent children, are frequently in dire need.[6]

If Appellees are correct, surely the exclusion of these needy from the federally-supported programs is arbitrary, unreasonable and constitutionally barred. Furthermore, according to Appellants' reasoning, the distinctions between the categories themselves—distinctions unrelated to actual need—must surely be invidious and unconstitutional.

If the reach of the Equal Protection Clause is broad enough to strike down Pennsylvania's durational residence requirement, it is broad enough to

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[6] In Pennsylvania, such individuals are provided for under the residual category of general assistance with state funds alone. See Section 432 of the "Public Welfare Code", 62 P.S. §432 (Cum. Ann. Pocket Pt., 1967).

condemn the entire present federal-state apparatus of public assistance, riddled as it is from end to end with distinctions and classifications unrelated to actual need.[7]

CONCLUSION

For the foregoing reasons, the defendants request the Court to declare the Act of June 24, 1937, P. L. 2051, Section 8-1, added by the Act of August 26, 1965, P. L. 389, 62 P.S. Section 2508.1, now re-enacted as Section 432 of the "Public Welfare Code", the Act of June 13, 1967, P. L. (Act No. 21), as constitutional and to deny plaintiffs any relief.

Respectfully submitted,

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[7] See, for example, Sections 1006 and 1405 of the Social Security Acts (49 Stat. 647, 42 U.S.C. §1206; 64 Stat. 555, 42 U.S.C. §1355) prohibiting aid to the blind and aid to the permanently and totally disabled, respectively, to inmates of a public institution and patients in institutions for tuberculosis or mental disease.

SUPREME COURT OF THE UNITED STATES

Nos. 9, 33, AND 34.—OCTOBER TERM, 1968.

Bernard Shapiro, Commissioner of Welfare of the State of Connecticut, Appellant, v. Vivian Thompson.	On Appeal From the United States District Court for the District of Connecticut.
Walter E. Washington et al., Appellants, v. Clay Mae Legrant et al.	On Appeal From the United States District Court for the District of Columbia.
Roger A. Reynolds et al., Appellants, v. Juanita Smith et al.	On Appeal From the United States District Court for the Eastern District of Pennsylvania.

[April 21, 1969.]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

These three appeals were restored to the calendar for reargument. 392 U. S. 920 (1968). Each is an appeal from a decision of a three-judge District Court holding unconstitutional a State or District of Columbia statutory provision which denies welfare assistance to residents of the State or District who have not resided within their jurisdictions for at least one year immediately preceding their applications for such assistance.[1] We affirm the judgments of the District Courts in the three cases.

[1] Accord: *Robertson* v. *Ott*, 284 F. Supp. 735 (D. C. D. Mass. 1968); *Johnson* v. *Robinson*, Civil No. 67–1883 (D. C. N. D. Ill., Feb. 20, 1968); *Ramos* v. *Health and Social Services Bd.*, 276 F. Supp. 474 (D. C. E. D. Wis. 1967); *Green* v. *Dept. of Pub. Welfare*, 270

I.

In No. 9, the Connecticut Welfare Department invoked § 17–2d of the Connecticut General Statutes[2] to deny the application of appellee Vivian Marie Thompson for assistance under the program for Aid to Families with Dependent Children (AFDC). She was a 19-year-old unwed mother of one child and pregnant with her second child when she changed her residence in June 1966 from Dorchester, Massachusetts, to Hartford, Connecticut, to live with her mother, a Hartford resident. She moved to her own apartment in Hartford in August 1966, when

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F. Supp. 173 (D. C. D. Del. 1967). Contra: *Waggoner* v. *Rosenn*, 286 F. Supp. 275 (D. C. M. D. Pa. 1968); see also *People ex rel. Heydenreich* v. *Lyons*, 374 Ill. 557, 30 N. E. 2d 46 (1940).

All but one of the appellees herein applied for assistance under the Aid to Families with Dependent Children Program (AFDC) which was established by the Social Security Act of 1935. 49 Stat. 620, as amended, 42 U. S. C. §§ 301–1394. The program provides partial federal funding of state assistance plans which meet certain specifications. One appellee applied for Aid to the Permanently and Totally Disabled which is also jointly funded by the States and the Federal Government. 42 U. S. C. §§ 1351–1355.

[2] Conn. Gen. Stat. Rev. § 17–2d (1966), now § 17–2c provides:

"When any person comes into this state without visible means of support for the immediate future and applies for aid to dependent children under chapter 301 or general assistance under part I of chapter 308 within one year from his arrival, such person shall be eligible only for temporary aid or care until arrangements are made for his return, provided ineligibility for aid to dependent children shall not continue beyond the maximum federal residence requirement."

An exception is made for those persons who come to Connecticut with a bona fide job offer or are self-supporting upon arrival in the State and for three months thereafter. 1 Conn. Welfare Manual, c. II, § 219.1–219.2 (1966).

her mother was no longer able to support her and her infant son. Because of her pregnancy, she was unable to work or enter a work training program. Her application for AFDC assistance, filed in August, was denied in November solely on the ground that, as required by § 17–2d, she had not lived in the State for a year before her application was filed. She brought this action in the District Court for the District of Connecticut where a three-judge court, one judge dissenting, declared § 17–2d unconstitutional. 270 F. Supp. 331 (1967). The majority held that the waiting-period requirement is unconstitutional because it "has a chilling effect on the right to travel." *Id.*, at 336. The majority also held that the provision was a violation of the Equal Protection Clause of the Fourteenth Amendment because the denial of relief to those resident in the State for less than a year is not based on any permissible purpose but is solely designed, as "Connecticut states quite frankly," "to protect its fisc by discouraging entry of those who come needing relief." *Id.*, at 336–337. We noted probable jurisdiction. 389 U. S. 1032 (1968).

In No. 33, there are four appellees. Three of them—appellees Harrell, Brown, and Legrant—applied for and were denied AFDC aid. The fourth, appellee Barley, applied for and was denied benefits under the program for Aid to the Permanently and Totally Disabled. The denial in each case was on the ground that the applicant had not resided in the District of Columbia for one year immediately preceding the filing of her application, as required by § 3–203 of the District of Columbia Code.[3]

[3] D. C. Code Ann. § 3–203 (1967) provides:

"Public assistance shall be awarded to or on behalf of any needy individual who either (a) has resided in the District for one year immediately preceding the date of filing his application for such assistance; or (b) who was born within one year immediately pre-

Appellee Minnie Harrell, now deceased, had moved with her three children from New York to Washington in September 1966. She suffered from cancer and moved to be near members of her family who lived in Washington.

Appellee Barley, a former resident of the District of Columbia, returned to the District in March 1941 and was committed a month later to St. Elizabeths Hospital as mentally ill. She has remained in that Hospital ever since. She was deemed eligible for release in 1965, and a plan was made to transfer her from the Hospital to a foster home. The plan depended, however, upon Mrs. Barley obtaining welfare assistance for her support. Her application for assistance under the program for Aid to the Permanently and Totally Disabled was denied because her time spent in the Hospital did not count in determining compliance with the one-year requirement.

Appellee Brown lived with her mother and two of her three children in Fort Smith, Arkansas. Her third child was living with appellee Brown's father in the District of Columbia. When her mother moved from Fort Smith to Oklahoma, appellee Brown, in February 1966, returned to the District of Columbia where she had lived as a child. Her application for AFDC assistance was approved insofar as it sought assistance for the child who had lived in the District with her father but was denied to the extent it sought assistance for the two other children.

Appellee Legrant moved with her two children from South Carolina to the District of Columbia in March 1967 after the death of her mother. She planned to live

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ceding the application for such aid, if the parent or other relative with whom the child is living has resided in the District for one year immediately preceding the birth; or (c) is otherwise within one of the categories of public assistance established by this chapter." See D. C. Handbook of Pub. Assistance Policies and Procedures, HPA-2, EL 9.1, I, III (1965) (hereinafter cited as D. C. Handbook).

with a sister and brother in Washington. She was pregnant and in ill health when she applied for and was denied AFDC assistance in July 1967.

The several cases were consolidated for trial, and a three-judge District Court was convened.[4] The court, one judge dissenting, held § 3–203 unconstitutional. 279 F. Supp. 22 (1967). The majority rested its decision on the ground that the one-year requirement was unconstitutional as a denial of the right to equal protection secured by the Due Process Clause of the Fifth Amendment. We noted probable jurisdiction. 390 U. S. 940 (1968).

In No. 34, there are two appellees, Smith and Foster, who were denied AFDC aid on the sole ground that they had not been residents of Pennsylvania for a year prior to their applications as required by § 432 (6) of the Pennsylvania Welfare Code.[5] Appellee Smith and her

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[4] In *Ex parte Cogdell*, 342 U. S. 163 (1951), this Court remanded to the Court of Appeals for the District of Columbia Circuit to determine whether 28 U. S. C. § 2282, requiring a three-judge court when the constitutionality of an Act of Congress is challenged, applied to Acts of Congress pertaining solely to the District of Columbia. The case was mooted below, and the question has never been expressly resolved. However, in *Berman* v. *Parker*, 348 U. S. 26 (1954), this Court heard an appeal from a three-judge court in a case involving the constitutionality of a District of Columbia statute. Moreover, three-judge district courts in the District of Columbia have continued to hear cases involving such statutes. See, *e. g.*, *Hobson* v. *Hansen*, 265 F. Supp. 902 (1967). Section 2282 requires a three-judge court to hear a challenge to the constitutionality of *"any* Act of Congress." (Emphasis supplied.) We see no reason to make an exception for Acts of Congress pertaining to the District of Columbia.

[5] Pa. Stat., Tit. 62, § 432 (6) (1968). See also, Pa. Public Assistance Manual, §§ 3150–3151 (1962). Section 432 (6) provides: "Assistance may be granted only to or in behalf of a person residing in Pennsylvania who (i) has resided therein for at least one year immediately preceding the date of application; (ii) last resided in

five minor children moved in December 1966 from Delaware to Philadelphia, Pennsylvania, where her father lived. Her father supported her and her children for several months until he lost his job. Appellee then applied for AFDC assistance and had received two checks when the aid was terminated. Appellee Foster, after living in Pennsylvania from 1953 to 1965, had moved with her four children to South Carolina to care for her grandfather and invalid grandmother and had returned to Pennsylvania in 1967. A three-judge District Court for the Eastern District of Pennsylvania, one judge dissenting, declared § 432 (6) unconstitutional. 277 F. Supp. 65 (1967). The majority held that the classification established by the waiting-period requirement is "without rational basis and without legitimate purpose or function" and therefore a violation of the Equal Protection Clause. *Id.*, at 67. The majority noted further that if the purpose of the statute was "to erect a barrier against the movement of indigent persons into the State or to effect their prompt departure after they have gotten there," it would be "patently improper and its implementation plainly impermissible." *Id.*, at 67–68. We noted probable jurisdiction. 390 U. S. 940 (1968).

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in a state which, by law, regulation or reciprocal agreement with Pennsylvania, grants public assistance to or in behalf of a person who has resided in such state for less than one year; (iii) is a married woman residing with a husband who meets the requirement prescribed in subclause (i) or (ii) of this clause; or (iv) is a child less than one year of age whose parent, or relative with whom he is residing, meets the requirement prescribed in subclause (i), (ii) or (iii) of this clause or resided in Pennsylvania for at least one year immediately preceding the child's birth. Needy persons who do not meet any of the requirements stated in this clause and who are transients or without residence in any state, may be granted assistance in accordance with rules, regulations, and standards established by the department."

II.

There is no dispute that the effect of the waiting-period requirement in each case is to create two classes of needy resident families indistinguishable from each other except that one is composed of residents who have resided a year or more, and the second of residents who have resided less than a year, in the jurisdiction. On the basis of this sole difference the first class is granted and the second class is denied welfare aid upon which may depend the ability of the families to obtain the very means to subsist—food, shelter, and other necessities of life. In each case, the District Court found that appellees met the test for residence in their jurisdictions, as well as all other eligibility requirements except the requirement of residence for a full year prior to their applications. On reargument, appellees' central contention is that the statutory prohibition of benefits to residents of less than a year creates a classification which constitutes an invidious discrimination denying them equal protection of the laws.[6] We agree. The interests which apellants assert are promoted by the classification either may not constitutionally be promoted by government or are not compelling governmental interests.

III.

Primarily, appellants justify the waiting-period requirement as a protective device to preserve the fiscal integrity of state public assistance programs. It is asserted that people who require welfare assistance during their first year of residence in a State are likely to become continuing burdens on state welfare programs. Therefore, the argument runs, if such people can be deterred from enter-

[6] This constitutional challenge cannot be answered by the argument that public assistance benefits are a "privilege" and not a "right." See *Sherbert* v. *Verner*, 374 U. S. 398, 404 (1963).

ing the jurisdiction by denying them welfare benefits during the first year, state programs to assist long-time residents will not be impaired by a substantial influx of indigent newcomers.[1]

There is weighty evidence that exclusion from the jurisdiction of the poor who need or may need relief was the specific objective of these provisions. In the Congress, sponsors of federal legislation to eliminate all residence requirements have been consistently opposed by representatives of state and local welfare agencies who have stressed the fears of the States that elimination of the requirements would result in a heavy influx of individuals into States providing the most generous benefits. See, *e. g.*, Hearings on H. R. 10032 Before the House Committee on Ways and Means, 87th Cong., 2d Sess., 309–310, 644 (1962); Hearings on H. R. 6000 Before the Senate Committee on Finance, 81st Cong., 2d Sess., 324–327 (1950). The sponsor of the Connecticut requirement said in its suport: "I doubt that Con-

[1] The waiting-period requirement has its antecedents in laws prevalent in England and the American Colonies centuries ago which permitted the ejection of individuals and families if local authorities thought they might become public charges. For example, the preamble of the English Law of Settlement and Removal of 1662 expressly recited the concern, also said to justify the three statutes before us, that large numbers of the poor were moving to parishes where more liberal relief policies were in effect. See generally Coll, Perspectives in Public Welfare: The English Heritage, March 1966, Welfare in Review 1. The 1662 law and the earlier Elizabethan Poor Law of 1601 were the models adopted by the American Colonies. Newcomers to a city, town, or county who might become public charges were "warned out" or "passed on" to the next locality. Initially, the funds for welfare payments were raised by local taxes, and the controversy as to responsibility for particular indigents was between localities in the same State. As States—first alone and then with federal grants—assumed the major responsibility, the contest of nonresponsibility became interstate.

necticut can and should continue to allow unlimited migration into the State on the basis of offering instant money and permanent income to all who can make their way to the State regardless of their ability to contribute to the economy." H. B. 82 Connecticut General Assembly House Proceedings, February Special Session, 1965, Vol. II, pt. 7, at 3504. In Pennsylvania, shortly after the enactment of the one-year requirement, the Attorney General issued an opinion construing the one-year requirement strictly because "[a]ny other conclusion would tend to attract the dependents of other states to our Commonwealth." 1937–1938 Official Opinions of the Attorney General, No. 240, at 110. In the District of Columbia case, the constitutionality of § 3–203 was frankly defended in the District Court and in this Court on the ground that it is designed to protect the jurisdiction from an influx of persons seeking more generous public assistance than might be available elsewhere.

We do not doubt that the one-year waiting period device is well suited to discourage the influx of poor families in need of assistance. An indigent who desires to migrate, resettle, find a new job, start a new life will doubtless hesitate if he knows that he must risk making the move without the possibility of falling back on state welfare assistance during his first year of residence, when his need may be most acute. But the purpose of inhibiting migration by needy persons into the State is constitutionally impermissible.

This Court long ago recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement. That

proposition was early stated by Chief Justice Taney in the *Passenger Cases*, 7 How. 283, 492 (1849):

> "For all the great purposes for which the Federal government was formed, we are one people, with one common country. We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States."

We have no occasion to ascribe the source of this right to travel interstate to a particular constitutional provision.[8] It suffices that, as MR. JUSTICE STEWART said for the Court in *United States* v. *Guest*, 383 U. S. 745, 757–758 (1966):

> "The constitutional right to travel from one State to another . . . occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized.
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> "[The] right finds no explicit mention in the Constitution. The reason, it has been suggested, is

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[8] In *Corfield* v. *Coryell*, 6 F. Cas. 546, 552 (No. 3230) (C. C. E. D. Pa. 1823), *Paul* v. *Virginia*, 8 Wall. 168, 180 (1868), and *Ward* v. *Maryland*, 12 Wall. 418, 430 (1870), the right to travel interstate was grounded upon the Privileges and Immunities Clause of Art. IV, § 2. See also *Slaughter-House Cases*, 16 Wall. 36, 79 (1872); *Twining* v. *New Jersey*, 211 U. S. 78, 97 (1908). In *Edwards* v. *California*, 314 U. S. 160, 181, 183–185 (DOUGLAS and JACKSON, JJ. concurring), and *Twining* v. *New Jersey*, *supra*, reliance was placed on the Privileges and Immunities Clause of the Fourteenth Amendment. See also *Crandall* v. *Nevada*, 6 Wall. 35 (1868). In *Edwards* v. *California*, *supra*, and *Passenger Cases*, 7 How. 283 (1849), a Commerce Clause approach was employed.

See also *Kent* v. *Dulles*, 357 U. S. 116, 125 (1958); *Aptheker* v. *Rusk*, 378 U. S. 500, 505–506 (1964); *Zemel* v. *Rusk*, 381 U. S. 1, 14 (1966), where the freedom of Americans to travel outside the country was grounded upon the Due Process Clause of the Fifth Amendment.

that a right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created. In any event, freedom to travel throughout the United States has long been recognized as a basic right under the Constitution."

Thus, the purpose of deterring the in-migration of indigents cannot serve as justification for the classification created by the one-year waiting period, since that purpose is constitutionally impermissible. If a law has "no other purpose . . . than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it [is] patently unconstitutional." *United States* v. *Jackson*, 390 U. S. 570, 581 (1968).

Alternatively, appellants argue that even if it is impermissible for a State to attempt to deter the entry of all indigents, the challenged classification may be justified as a permissible state attempt to discourage those indigents who would enter the State solely to obtain larger benefits. We observe first that none of the statutes before us is tailored to serve that objective. Rather, the class of barred newcomers is all-inclusive, lumping the great majority who come to the State for other purposes with those who come for the sole purpose of collecting higher benefits. In actual operation, therefore, the three statutes enact what in effect are nonrebuttable presumptions that every applicant for assistance in his first year of residence came to the jurisdiction solely to obtain higher benefits. Nothing whatever in any of these records supplies any basis in fact for such a presumption.

More fundamentally, a State may no more try to fence out those indigents who seek higher welfare benefits than it may try to fence out indigents generally. Implicit in any such distinction is the notion that indigents who enter a State with the hope of securing higher welfare benefits are somehow less deserving than indigents who do not

take this consideration into account. But we do not perceive why a mother who is seeking to make a new life for herself and her children should be regarded as less deserving because she considers, among others factors, the level of a State's public assistance. Surely such a mother is no less deserving than a mother who moves into a particular State in order to take advantage of its better educational facilities.

Appellants argue further that the challenged classification may be sustained as an attempt to distinguish between new and old residents on the basis of the contribution they have made to the community through the payment of taxes. We have difficulty seeing how long-term residents who qualify for welfare are making a greater present contribution to the State in taxes than indigent residents who have recently arrived. If the argument is based on contributions made in the past by the long-term residents, there is some question, as a factual matter, whether this argument is applicable in Pennsylvania where the record suggests that some 40% of those denied public assistance because of the waiting period had lengthy prior residence in the State.[9] But we need not rest on the particular facts of these cases. Appellants' reasoning would logically permit the State to bar new residents from schools, parks, and libraries or deprive them of police and fire protection. Indeed it would permit the State to apportion all benefits and services according to the past tax contributions of its

[9] Furthermore, the contribution rationale can hardly explain why the District of Columbia and Pennsylvania bar payments to children who have not lived in the jurisdiction for a year regardless of whether the parents have lived in the jurisdiction for that period. See D. C. Code § 3-203; D. C. Handbook, EL 9.1, I (C) (1965); Pa. Stat., Tit. 62, § 432 (6) (1968). Clearly, the children who were barred would not have made a contribution during that year.

citizens. The Equal Protection Clause prohibits such an apportionment of state services.[10]

We recognize that a State has a valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures, whether for public assistance, public education, or any other program. But a State may not accomplish such a purpose by invidious distinctions between classes of its citizens. It could not, for example, reduce expenditures for education by barring indigent children from its schools. Similarly, in the cases before us, appellants must do more than show that denying welfare benefits to new residents saves money. The saving of welfare costs cannot be an independent ground for an invidious classification.[11]

In sum, neither deterrence of indigents from migrating to the State nor limitation of welfare benefits to those regarded as contributing to the State is a constitutionally permissible state objective.

IV.

Appellants next advance as justification certain administrative and related governmental objectives allegedly served by the waiting-period requirement.[12] They argue

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[10] We are not dealing here with state insurance programs which may legitimately tie the amount of benefits to the individual's contributions.

[11] In *Rinaldi* v. *Yeager*, 384 U. S. 305 (1966), New Jersey attempted to reduce expenditures by requiring prisoners who took an unsuccessful appeal to reimburse the State out of their institutional earnings for the cost of furnishing a trial transcript. This Court held the New Jersey statute unconstitutional because it did not require similar repayments from unsuccessful appellants given a suspended sentence, placed on probation, or sentenced only to a fine. There was no rational basis for the distinction between unsuccessful appellants who were in prison and those who were not.

[12] Appellant in No. 9, the Connecticut Welfare Commissioner, disclaims any reliance on this contention. In No. 34, the District

that the requirement (1) facilitates the planning of the welfare budget; (2) provides an objective test of residency; (3) minimizes the opportunity for recipients fraudulently to receive payments from more than one jurisdiction; and (4) encourages early entry of new residents into the labor force.

At the outset, we reject appellants' argument that a mere showing of a rational relationship between the waiting period and these four admittedly permissible state objectives will suffice to justify the classification. See *Lindsley* v. *Natl. Carbonic Gas Co.*, 220 U. S. 61, 78 (1911); *Flemming* v. *Nestor*, 363 U. S. 603, 611 (1960); *McGowan* v. *Maryland*, 366 U. S. 420, 426 (1961). The waiting-period provision denies welfare benefits to otherwise eligible applicants solely because they have recently moved into the jurisdiction. But in moving from State to State or to the District of Columbia appellees were exercising a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional. Cf. *Skinner* v. *Oklahoma*, 316 U. S. 535, 541 (1942); *Korematsu* v. *United States*, 323 U. S. 214, 216 (1944); *Bates* v. *Little Rock*, 361 U. S. 516, 524 (1960); *Sherbert* v. *Verner*, 374 U. S. 398, 406 (1963).

The argument that the waiting-period requirement facilitates budget predictability is wholly unfounded. The records in all three cases are utterly devoid of evidence that either State or the District of Columbia in fact uses the one-year requirement as a means to predict the number of people who will require assistance in the budget year. None of the appellants takes a census of new residents or collects any other data that would reveal the number of newcomers in the State less than a year.

Court found as a fact that the Pennsylvania requirement served none of the claimed functions. 277 F. Supp. 65, 68 (1967).

Nor are new residents required to give advance notice of their need for welfare assistance.[13] Thus, the welfare authorities cannot know how many new residents come into the jurisdiction in any year, much less how many of them will require public assistance. In these circumstances, there is simply no basis for the claim that the one-year waiting requirement serves the purpose of making the welfare budget more predictable. In Connecticut and Pennsylvania the irrelevance of the one-year requirement to budgetary planning is further underscored by the fact that temporary, partial assistance is given to some new residents[14] and full assistance is given to other new residents under reciprocal agreements.[15] Finally, the claim that a one-year waiting requirement is used for planning purposes is plainly belied by the fact that the requirement is not also imposed on applicants who are long-term residents, the group that receives the bulk of welfare payments. In short, the States rely on methods other than the one-year requirement to make budget estimates. In No. 34, the Director of the Pennsylvania Bureau of Assistance Policies and Standards testified that, based on experience in Pennsylvania and elsewhere, her office had already estimated how much the elimination of the one-year requirement would cost and that the estimates of costs of other changes in regulations "have proven exceptionally accurate."

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[13] Of course, such advance notice would inevitably be unreliable since some who registered would not need welfare a year later while others who did not register would need welfare.

[14] See Conn. Gen. Stat. Rev. § 17-2d, now § 17-2c, and Pa. Pub. Assistance Manual, § 3154 (1968).

[15] Both Connecticut and Pennsylvania have entered into open-ended interstate compacts in which they have agreed to eliminate the durational requirement for anyone who comes from another State which has also entered into the compact. Conn. Gen. Stat. Rev. § 17-21a (1968); Pa. Pub. Assistance Manual, § 3150, App. I (1967).

The argument that the waiting period serves as an administratively efficient rule of thumb for determining residency similarly will not withstand scrutiny. The residence requirement and the one-year waiting-period requirement are distinct and independent prerequisites for assistance under these three statutes, and the facts relevant to the determination of each are directly examined by the welfare authorities.[16] Before granting an application, the welfare authorities investigate the applicant's employment, housing, and family situation and in the course of the inquiry necessarily learn the facts upon which to determine whether the applicant is a resident.[17]

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[16] In Pennsylvania, the one-year waiting-period requirement but not the residency requirement is waived under reciprocal agreements. Pa. Stat., Tit. 62, § 432 (6) (1968); Pa. Pub. Assistance Manual § 3151.21 (1962).

1 Conn. Welfare Manual, c. II, § 220 (1966), provides that "[r]esidence within the state shall mean that the applicant is living in an established place of abode and the plan is to remain." A person who meets this requirement does not have to wait a year for assistance if he entered the State with a bona fide job offer or with sufficient funds to support himself without welfare for three months. *Id.*, at § 219.2.

HEW Handbook of Pub. Assistance Administration, pt. IV, § 3650 (1966), clearly distinguishes between residence and duration of residence. It defines residence, as is conventional, in terms of intent to remain in the jurisdiction, and it instructs interviewers that residence and length of residence "are two distinct aspects . . . ."

[17] See, *e. g.*, D. C. Handbook, chapters on Eligibility Payments, Requirements, Resources, and Reinvestigation for an indication of how thorough these investigations are. See also 1 Conn. Welfare Manual, c. 1 (1967); Pa. Pub. Assistance Manual §§ 3170–3330 (1962).

The Department of Health, Education, and Welfare has proposed the elimination of individual investigations, except for spot checks, and the substitution of a declaration system, under which the "agency accepts the statements of the applicant for or recipient of assistance, about facts that are within his knowledge and competence . . . as a basis for decisions regarding his eligibility and extent of entitlement." Dept. of HEW, Determination of Eligibility for

Similarly, there is no need for a State to use the one-year waiting period as a safeguard against fraudulent receipt of benefits;[18] for less drastic means are available, and are employed, to minimize that hazard. Of course, a State has a valid interest in preventing fraud by any applicant, whether a newcomer or a long-time resident. It is not denied however that the investigations now conducted entail inquiries into facts relevant to that subject. In addition, cooperation among state welfare departments is common. The District of Columbia, for example, provides interim assistance to its former residents who have moved to a State which has a waiting period. As a matter of course, District officials send a letter to the welfare authorities in the recipient's new community "to request the information needed to continue assistance."[19] A like procedure would be an effective safeguard against the hazard of double payments. Since double payments can be prevented by a letter or a telephone call, it is unreasonable to accomplish this objective by the blunderbuss method of denying assistance to all indigent newcomers for an entire year.

Pennsylvania suggests that the one-year waiting period is justified as a means of encouraging new residents to join the labor force promptly. But this logic would also require a similar waiting period for long-term residents of the State. A state purpose to encourage employment

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Public Assistance Programs, 33 Fed. Reg. 17189 (1968). See also Hoshino, Simplification of the Means Test and its Consequences, 41 Soc. Serv. Rev. 237, 247–249 (1967); Burns, What's Wrong With Public Welfare?, 36 Soc. Serv. Rev. 111, 114–115 (1962). Presumably the statement of an applicant that he intends to remain in the jurisdiction would be accepted under a declaration system.

[18] The unconcern of Connecticut and Pennsylvania with the one-year requirement as a means of preventing fraud is made apparent by the waiver of the requirement in reciprocal agreements with other States. See n. 15, *supra*.

[19] D. C. Handbook, RV 2.1, I, II (B) (1967). See also Pa. Pub. Assistance Manual § 3153 (1962).

provides no rational basis for imposing a one-year waiting-period restriction on new residents only.

We conclude therefore that appellants in these cases do not use and have no need to use the one-year requirement for the governmental purposes suggested. Thus, even under traditional equal protection tests a classification of welfare applicants according to whether they have lived in the State for one year would seem irrational and unconstitutional.[20] But, of course, the traditional criteria do not apply in these cases. Since the classification here touches on the fundamental right of interstate movement, its constitutionality must be judged by the stricter standard of whether it promotes a *compelling* state interest. Under this standard, the waiting period requirement clearly violates the Equal Protection Clause.[21]

V.

Connecticut and Pennsylvania argue, however, that the constitutional challenge to the waiting period requirements must fail because Congress expressly approved the imposition of the requirement by the States as part of the jointly funded AFDC program.

Section 402 (b) of the Social Security Act of 1935, as amended, 42 U. S. C. § 602 (b), provides that:

"The Secretary shall approve any [state assistance] plan which fulfills the conditions specified in sub-

[20] Under the traditional standard, equal protection is denied only if the classification is "without any reasonable basis," *Lindsley* v. *National Carbonic Gas Co.*, 220 U. S. 61, 78 (1911); see also *Flemming* v. *Nestor*, 363 U. S. 603 (1960).

[21] We imply no view of the validity of waiting period *or* residence requirements determining eligibility to vote, eligibility for tuition-free education, to obtain a license to practice a profession, to hunt or fish, and so forth. Such requirements may promote compelling state interests on the one hand, or, on the other, may not be penalties upon the exercise of the constitutional right of interstate travel.

section (a) of this section, except that he shall not approve any plan which imposes as a condition of eligibility for aid to families with dependent children, a residence requirement which denies aid with respect to any child residing in the State (1) who has resided in the State for one year immediately preceding the application for such aid, or (2) who was born within one year immediately preceding the application, if the parent or other relative with whom the child is living has resided in the State for one year immediately preceding the birth."

On its face, the statute does not approve, much less prescribe, a one-year requirement. It merely directs the Secretary of Health, Education, and Welfare not to disapprove plans submitted by the States because they include such a requirement.[22] The suggestion that Congress enacted that directive to encourage state participation in the AFDC program is completely refuted by the legislative history of the section. That history discloses that Congress enacted the directive to curb hardships resulting from lengthy residence requirements. Rather than an approval or a prescription of the requirement in state plans, the directive was the means chosen by Congress to deny federal funding to any State which persisted in stipulating excessive residence requirements as a condition of the payment of benefits.

One year before the Social Security Act was passed, 20 of the 45 States which had aid to dependent children programs required residence in the State for two or more years. Ten other States required two or more years of

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[22] As of 1964, 11 jurisdictions imposed no residence requirement whatever for AFDC assistance. They were Alaska, Georgia, Hawaii, Kentucky, New Jersey, New York, Rhode Island, Vermont, Guam, Puerto Rico, and the Virgin Islands. See Dept. of HEW, Characteristics of State Public Assistance Plans under the Social Security Act (Pub. Assistance Rep. No. 50, 1964 ed.).

residence in a particular town or county. And 33 States required at least one year of residence in a particular town or county.[23] Congress determined to combat this restrictionist policy. Both the House and Senate Committee Reports expressly stated that the objective of § 402 (b) was to force "[l]iberality of residence requirement."[24] Not a single instance can be found in the debates or committee reports supporting the contention that § 402 (b) was enacted to encourage participation by the States in the AFDC program. To the contrary, those few who addressed themselves to waiting-period requirements emphasized that participation would depend on a State's repeal or drastic revision of existing requirements. A congressional demand on 41 States to repeal or drastically revise offending statutes is hardly a way to enlist their cooperation.[25]

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[23] Social Security Board, Social Security in America 235–236 (1937).

[24] H. R. Rep. No. 615, 74th Cong., 1st Sess., 24; S. Rep. No. 628, 74th Cong., 1st Sess., 35. Furthermore, the House Report cited President Roosevelt's statement in his Social Security Message that "People want decent homes to live in; they want to locate them where they can engage in productive work. . . ." H. R. Rep., *supra*, at 2. Clearly this was a call for greater freedom of movement.

In addition to the statement in the above Committee report, see the remarks of Rep. Doughton (floor manager of the Social Security bill in the House) and Rep. Vinson. 79 Cong. Rec. 5474, 5602–5603 (1935). These remarks were made in relation to the waiting-period requirements for old-age assistance, but they apply equally to the AFDC program.

[25] Section 402 (b) required the repeal of 30 state statutes which imposed too long a waiting period and 11 state statutes (as well as the Hawaii statute) which required residence in a particular town or county. See Social Security Board, Social Security in America 235–236 (1937).

It is apparent that Congress was not intimating any view of the constitutionality of a one-year limitation. The constitutionality of any scheme of federal social security legislation was a matter of

But even if we were to assume, *arguendo*, that Congress did approve the imposition of a one-year waiting period, it is the responsive *state* legislation which infringes constitutional rights. By itself § 402 (b) has absolutely no restrictive effect. It is therefore not that statute but only the state requirements which pose the constitutional question.

Finally, even if it could be argued that the constitutionality of § 402 (b) is somehow at issue here, it follows from what we have said that the provision, insofar as it permits the one-year waiting-period requirement, would be unconstitutional. Congress may not authorize the States to violate the Equal Protection Clause. Perhaps Congress could induce wider state participation in school construction if it authorized the use of joint funds for the building of segregated schools. But could it seriously be contended that Congress would be constitutionally justified in such authorization by the need to secure state cooperation? Congress is without power to enlist state cooperation in a joint federal-state program by legislation which authorizes the States to violate the Equal Protection Clause. *Katzenbach* v. *Morgan*, 384 U. S. 641, 651, n. 10 (1966).

VI.

The waiting-period requirement in the District of Columbia Code involved in No. 33 is also unconstitutional even though it was adopted by Congress as an exercise of federal power. In terms of federal power, the discrimination created by the one-year requirement violates the Due

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doubt at that time in light of the decision in *Schecter Poultry Corp.* v. *United States*, 295 U. S. 495 (1935). Throughout the House debates congressmen discussed the constitutionality of the fundamental taxing provisions of the Social Security Act, see *e. g.*, 79 Cong. Rec. 5783 (1935) (remarks of Rep. Cooper), but not once discussed the constitutionality of § 402 (b).

Process Clause of the Fifth Amendment. "[W]hile the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of due process.'" *Schneider v. Rusk*, 377 U. S. 163, 168 (1964); *Bolling v. Sharpe*, 347 U. S. 497 (1954). For the reasons we have stated in invalidating the Pennsylvania and Connecticut provisions, the District of Columbia provision is also invalid—the Due Process Clause of the Fifth Amendment forbids Congress from denying public assistance to poor persons otherwise eligible solely on the ground that they have not been residents of the District of Columbia for one year at the time their applications are filed.

Accordingly, the judgments in Nos. 9, 33, and 34 are

Affirmed.

SUPREME COURT OF THE UNITED STATES

Nos. 9, 33, AND 34.—OCTOBER TERM, 1968.

Bernard Shapiro, Commissioner of Welfare of the State of Connecticut, Appellant, v. Vivian Thompson.	On Appeal From the United States District Court for the District of Connecticut.
Walter E. Washington et al., Appellants, v. Clay Mae Legrant et al.	On Appeal From the United States District Court for the District of Columbia.
Roger A. Reynolds et al., Appellants, v. Juanita Smith et al.	On Appeal From the United States District Court for the Eastern District of Pennsylvania.

[April 21, 1969.]

MR. JUSTICE STEWART, concurring.

In joining the opinion of the Court, I add a word in response to the dissent of my Brother HARLAN, who, I think, has quite misapprehended what the Court's opinion says.

The Court today does *not* "pick out particular human activities, characterize them as 'fundamental,' and give them added protection . . . ." To the contrary, the Court simply recognizes, as it must, an established constitutional right, and gives to that right no less protection than the Constitution itself demands.

"The constitutional right to travel from one State to another . . . has been firmly established and repeatedly recognized." *United States* v. *Guest*, 383 U. S. 745, 757.

This constitutional right, which, of course, includes the right of "entering and abiding in any State in the Union," *Truax* v. *Raich*, 239 U. S. 33, 39, is *not* a mere conditional liberty subject to regulation and control under conventional due process or equal protection standards.[1] "[T]he right to travel freely from State to State finds constitutional protection that is quite independent of the Fourteenth Amendment." *United States* v. *Guest*, *supra*, at 760, n. 17.[2] As we made clear in *Guest*, it is a right broadly assertable against private interference as well as governmental action.[3] Like the right of association, *NAACP* v. *Alabama*, 357 U. S. 449, it is a virtually unconditional personal right,[4] guaranteed by the Constitution to us all.

It follows, as the Court says, that "the purpose of deterring the in-migration of indigents cannot serve as justification for the classification created by the one-year

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[1] By contrast, the "right" of international travel has been considered to be no more than an aspect of the "liberty" protected by the Due Process Clause of the Fifth Amendment. *Kent* v. *Dulles*, 357 U. S. 116, 125; *Aptheker* v. *Secretary of State*, 378 U. S. 500, 505–506. As such, this "right," the Court has held, can be regulated within the bounds of due process. *Zemel* v. *Rusk*, 381 U. S. 1.

[2] The constitutional right of interstate travel was fully recognized long before adoption of the Fourteenth Amendment. See the statement of Chief Justice Taney in the *Passenger Cases*, 7 How. 283, 492:

"For all the great purposes for which the Federal government was formed, we are one people, with one common country. We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States."

[3] Mr. Justice Harlan was alone in dissenting from this square holding in *Guest*. 383 U. S., at 762.

[4] The extent of emergency governmental power temporarily to prevent or control interstate travel, *e. g.*, to a disaster area, need not be considered in these cases.

waiting period, since that purpose is constitutionally impermissible." And it further follows, as the Court says, that any *other* purposes offered in support of a law that so clearly impinges upon the constitutional right of interstate travel must be shown to reflect a *compelling* governmental interest. This is necessarily true whether the impinging law be a classification statute to be tested against the Equal Protection Clause, or a state or federal regulatory law, to be tested against the Due Process Clause of the Fourteenth or Fifth Amendment. As MR. JUSTICE HARLAN wrote for the Court more than a decade ago, "[T]o justify the deterrent effect . . . on the free exercise . . . of their constitutionally protected right, . . . a 'subordinating interest of the State must be compelling.'" *NAACP* v. *Alabama, supra,* at 463.

The Court today, therefore, is not "contriving new constitutional principles." It is deciding these cases under the aegis of established constitutional law.[5]

[5] It is to be remembered that the Court today *affirms* the judgments of three different federal district courts, and that at least four other federal courts have reached the same result. See *ante,* p. —, n. 1.

SUPREME COURT OF THE UNITED STATES

Nos. 9, 33, AND 34.—OCTOBER TERM, 1968.

Bernard Shapiro, Commissioner of Welfare of the State of Connecticut, Appellant, v. Vivian Thompson.	On Appeal From the United States District Court for the District of Connecticut.
Walter E. Washington et al., Appellants, v. Clay Mae Legrant et al.	On Appeal From the United States District Court for the District of Columbia.
Roger A. Reynolds et al., Appellants, v. Juanita Smith et al.	On Appeal From the United States District Court for the Eastern District of Pennsylvania.

[April 21, 1969.]

MR. CHIEF JUSTICE WARREN, with whom MR. JUSTICE BLACK joins, dissenting.

In my opinion the issue before us can be simply stated: may Congress, acting under one of its enumerated powers, impose minimal nationwide residence requirements or authorize the States to do so? Since I believe that Congress does have this power and has constitutionally exercised it in these cases, I must dissent.

I.

The Court insists that § 402 (b) of the Social Security Act "does not approve, much less prescribe, a one-year requirement." *Ante*, at 20. From this reading of the legislative history it concludes that Congress did not

intend to authorize the States to impose residence requirements. An examination of the relevant legislative materials compels, in my view, the opposite conclusion, *i. e.*, Congress intended to authorize state residence requirements of up to one year.

The Great Depression of the 1930's exposed the inadequacies of state and local welfare programs and dramatized the need for federal participation in welfare assistance. See J. Brown, Public Relief 1929–1939 (1940). Congress determined that the Social Security Act, containing a system of unemployment and old-age insurance as well as the categorical assistance programs now at issue, was to be a major step designed to ameliorate the problems of economic insecurity. The primary purpose of the categorical assistance programs was to encourage the States to provide new and greatly enhanced welfare programs. See, *e. g.*, S. Rep. No. 628, 74th Cong., 1st Sess., 5–6, 18–19 (1935); H. R. Rep. No. 615, 74th Cong., 1st Sess., 4 (1935). Federal aid would mean an immediate increase in the amount of benefits paid under state programs. But federal aid was to be conditioned upon certain requirements so that the States would remain the basic administrative units of the welfare system and would be unable to shift the welfare burden to local governmental units with inadequate financial resources. See Advisory Commission on Intergovernmental Relations, Statutory and Administrative Controls in Federal Grants for Public Assistance 9–26 (1964). Significantly, the categories of assistance programs created by the Social Security Act corresponded to those already in existence in a number of States. See J. Brown, Public Relief 1929–1939, at 26–32. Federal entry into the welfare area can therefore be best described as a major experiment in "cooperative federalism," *King* v. *Smith*, 392 U. S. 309, 317 (1968), combining state and federal participation to solve the problems of the depression.

Each of the categorical assistance programs contained in the Social Security Act allowed participating States to impose residence requirements as a condition of eligibility for benefits. Congress also imposed a one-year requirement for the categorical assistance programs operative in the District of Columbia. See H. R. Rep. No. 891, 74th Cong., 1st Sess. (1935) (old age pensions); H. R. Rep. No. 201, 74th Cong., 1st Sess. (1935) (aid to the blind). The congressional decision to allow the States to impose residence requirements and to enact such a requirement for the District was the subject of considerable discussion. Both those favoring lengthy residence requirements [1] and those opposing all requirements [2] pleaded their case during the congressional hearings on the Social Security Act. Faced with the competing claims of States who feared that abolition of residence requirements would result in an influx of persons seeking higher welfare payments and of organizations who stressed the unfairness of such requirements to transient workers forced by the economic dislocation of the depression to seek work far from their homes, Congress chose a middle course. It required those States seeking federal grants for categorical assistance to reduce their existing residence requirements to what Congress viewed as an acceptable maximum. However, Congress accommodated state fears by allowing the States to retain minimal residence requirements.

Congress quickly saw evidence that the system of welfare assistance contained in the Social Security Act including residence requirements was operating to encourage States to expand and improve their categorical

[1] See, *e. g.*, Hearings on H. R. 4120 before the House Committee on Ways and Means, 74th Cong., 1st Sess., 831–832, 861–871 (1935).

[2] See, *e. g.*, Hearings on S. 1130 before the Senate Committee on Finance, 74th Cong., 1st Sess., 522–540, 643, 656 (1935).

assistance programs. For example, the Senate was told in 1939:

> "The rapid expansion of the program for aid to dependent children in the country as a whole since 1935 stands in marked contrast to the relatively stable picture of mothers' aid in the preceding 4-year period from 1932 to 1935. The extension of the program in the last 3 years is due to Federal contributions which encouraged the matching of State and local funds." S. Rep. No. 734, 76th Cong., 1st Sess., 29 (1939).

The trend observed in 1939 continued as the States responded to the federal stimulus for improvement in the scope and amount of categorical assistance programs. See Wedemeyer & Moore, The American Welfare System, 54 Calif. L. Rev. 326, 347–356 (1966). Residence requirements have remained a part of this combined state-federal welfare program for 34 years. Congress has adhered to its original decision that residence requirements were necessary in the face of repeated attacks against these requirements.[1] The decision to retain residence requirements, combined with Congress' continuing desire to encourage wider state participation in categorical assistance programs, indicates to me that Congress has authorized the imposition by the States of residence requirements.

II.

Congress has imposed a residence requirement in the District of Columbia and authorized the States to impose similar requirements. The issue before us must therefore be framed in terms of whether Congress may

[1] See *e. g.*, Hearings on H. R. 10032 before the House Committee on Ways and Means, 87th Cong., 2d Sess., 355, 385–405, 437 (1962); Hearings on H. R. 6000 before the Senate Committee on Finance, 81st Cong., 2d Sess., 142–143 (1950).

create minimal residence requirements, not whether the States, acting alone, may do so. See *Prudential Insurance Co.* v. *Benjamin*, 328 U. S. 408 (1946); *In re Rahrer*, 140 U. S. 545 (1891). Appellees insist that a congressionally mandated residence requirement would violate their right to travel. The import of their contention is that Congress, even under its "plenary"[4] power to control interstate commerce, is constitutionally prohibited from imposing residence requirements. I reach a contrary conclusion for I am convinced that the extent of the burden on interstate travel when compared with the justification for its imposition requires the Court to uphold this exertion of federal power.

Congress, pursuant to its commerce power, has enacted a variety of restrictions upon interstate travel. It has taxed air and rail fares and the gasoline needed to power cars and trucks which move interstate. 26 U. S. C. § 4261 (air fares); 26 U. S. C., 1952 ed., § 3469, repealed in part by P. L. 87–508, § 5 (b) (rail fares); 26 U. S. C. § 4081 (gasoline). Many of the federal safety regulations of common carriers which cross state lines burden the right to travel. 45 U. S. C. §§ 1–46 (railroad safety appliances); 49 U. S. C. § 1421 (air safety regulations). And Congress has prohibited by criminal statute interstate travel for certain purposes. *E. g.*, 18 U. S. C. § 1952. Although each of these restrictions operates as a limitation upon free interstate movement of persons, their constitutionality appears well settled. See *Texas & Pacific Railway Co.* v. *Rigsby*, 241 U. S. 33, 41 (1916); *Southern Railway Co.* v. *United States*, 222 U. S. 20 (1911); *United States* v. *Zizzo*, 338 F. 2d 577 (C. A. 7th Cir., 1964), cert. denied, 381 U. S. 915 (1965). As the Court observed in *Zemel* v. *Rusk*, 381 U. S. 1, 14 (1965), "the fact that liberty cannot be inhibited without due

[4] See *e. g.*, *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U. S. 241, 256–260 (1964).

process of law does not mean that it can under no circumstances be inhibited."

The Court's right-to-travel cases lend little support to the view that congressional action is invalid merely because it burdens the right to travel. Most of our cases fall into two categories: those in which *state* imposed restrictions were involved, see, *e. g.*, *Edwards* v. *California*, 314 U. S. 160 (1941); *Crandall* v. *Nevada*, 6 Wall. 35 (1867), and those concerning congressional decisions to remove impediments to interstate movement, see, *e. g.*, *United States* v. *Guest*, 383 U. S. 745 (1966). Since the focus of our inquiry must be whether Congress would exceed permissible bounds by imposing residence requirements, neither group of cases offers controlling principles.

In only three cases have we been confronted with an assertion that Congress has impermissibly burdened the right to travel. *Kent* v. *Dulles*, 357 U. S. 116 (1958), did invalidate a burden on the right to travel; however, the restriction was voided on the nonconstitutional basis that Congress did not intend to give the Secretary of State power to create the restriction at issue. *Zemel* v. *Rusk*, *supra*, on the other hand, sustained a flat prohibition of travel to certain designated areas and rejected an attack that Congress could not constitutionally impose this restriction. *Aptheker* v. *Secretary of State*, 378 U. S. 500 (1964), is the only case in which this Court invalidated on a constitutional basis a congressionally imposed restriction. *Aptheker* also involved a flat prohibition but in combination with a claim that the congressional restriction compelled a potential traveler to choose between his right to travel and his First Amendment right of freedom of association. It was this Hobson's Choice, we later explained, which forms the rationale of *Aptheker*. See *Zemel* v. *Rusk*, *supra*, at 16. *Aptheker* thus contains two characteristics distinguishing it from the appeals now before the Court: a combined

infringement of two constitutionally protected rights and a flat prohibition upon travel. Residence requirements do not create a flat prohibition for potential walfare recipients may move from State to State and establish residence wherever they please. Nor is any claim made by appellees that residence requirements compel them to choose between the right to travel and another constitutional right.

Zemel v. *Rusk*, the most recent of the three cases, provides a framework for analysis. The core inquiry is "the extent of the governmental restriction imposed" and the "extent of the necessity for the restriction." *Id.*, at 14. As already noted, travel itself is not prohibited. Any burden inheres solely in the fact that a potential welfare recipient might take into consideration the loss of welfare benefits for a limited period of time if he changes his residence. Not only is this burden of uncertain degree,[5] but appellees themselves assert there is evidence that few welfare recipients have in fact been deterred by residence requirements. See Harvith, The Constitutionality of Residence Tests for General and Categorical Assistance Programs, 54 Calif. L. Rev. 567, 615–618 (1966); Note, Residence Requirements in State Public Welfare Statutes, 51 Iowa L. Rev. 1080, 1083–1085 (1966).

The insubstantiality of the restriction imposed by residence requirements must then be evaluated in light of the possible congressional reasons for such requirements. See, *e. g.*, *McGowan* v. *Maryland*, 366 U. S. 420, 425–427 (1961). One fact which does emerge with clarity from the legislative history is Congress' belief that a program of cooperative federalism combining federal aid with

[5] The burden is uncertain because indigents who are disqualified from categorical assistance by residence requirements are not left wholly without assistance. Each of the appellees in these cases found alternative sources of assistance after their disqualification.

enhanced state participation would result in an increase in the scope of welfare programs and level of benefits. Given the apprehensions of many States that an increase in benefits without minimal residence requirements would result in an inability to provide an adequate welfare system, Congress deliberately adopted the intermediate course of a cooperative program. Such a program, Congress believed, would encourage the States to assume greater welfare responsibilities and would give the States the necessary financial support for such an undertaking. Our cases require only that Congress have a rational basis for finding that a chosen regulatory scheme is necessary to the furtherance of interstate commerce. See, *e. g.*, *Katzenbach* v. *McClung*, 379 U. S. 294 (1964); *Wickard* v. *Filburn*, 317 U. S. 111 (1942). Certainly, a congressional finding that residence requirements allowed each State to concentrate its resources upon new and increased programs of rehabilitation ultimately resulting in an enhanced flow of commerce as the economic condition of welfare recipients progressively improved is rational and would justify imposition of residence requirements under the Commerce Clause. And Congress could have also determined that residence requirements fostered personal mobility. An individual no longer dependent upon welfare would be presented with an unfettered range of choices so that a decision to migrate could be made without regard to considerations of possible economic dislocation.

Appellees suggest, however, that Congress was not motivated by rational considerations. Residence requirements are imposed, they insist, for the illegitimate purpose of keeping poor people from migrating. Not only does the legislative history point to an opposite conclusion, but "into the motives which induced members of Congress to [act] . . . this Court may not enquire."

Arizona v. *California*, 283 U. S. 423, 455 (1931). We do not attribute an impermissible purpose to Congress if the result would be to strike down an otherwise valid statute. *United States* v. *O'Brien*, 391 U. S. 367, 383 (1968); *McCray* v. *United States*, 195 U. S. 27, 56 (1904). Since the congressional decision is rational and the restriction on travel insubstantial, I conclude that residence requirements can be imposed by Congress as an exercise of its power to control interstate commerce consistent with the constitutionally guaranteed right to travel.

Without an attempt to determine whether any of Congress' enumerated powers would sustain residence requirements, the Court holds that congressionally imposed requirements violate the Due Process Clause of the Fifth Amendment. It thus suggests that, even if residence requirements would be a permissible exercise of the commerce power, they are "so injustifiable as to be violative of due process." *Ante*, at 23. While the reasons for this conclusion are not fully explained, the Court apparently believes that, in the words of *Bolling* v. *Sharpe*, 347 U. S. 497, 500 (1954), residence requirements constitute "an arbitrary deprivation" of liberty.

If this is the import of the Court's opinion, then it seems to have departed from our precedents. We have long held that there is no requirement of uniformity when Congress acts pursuant to its commerce power. *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381, 401 (1940); *Currin* v. *Wallace*, 306 U. S. 1, 13–14 (1939).* I do not suggest that Congress is completely free when

* Some of the cases go so far as to intimate that at least in the area of taxation Congress is not inhibited by any problems of classification. See *Helvering* v. *Lerner Stores Corp.*, 314 U. S. 463, 468 (1941); *Steward Machine Co.* v. *Davis* 301 U. S. 548, 584 (1937); *LaBelle Iron Works* v. *United States*, 256 U. S. 377, 392 (1921).

legislating under one of its enumerated powers to enact wholly arbitrary classifications, for *Bolling* v. *Sharpe*, *supra*, and *Schneider* v. *Rusk*, 377 U. S. 163 (1964), counsel otherwise. Neither of these cases, however, is authority for invalidation of congressionally imposed residence requirements. The classification in *Bolling* required racial segregation in the public schools of the District of Columbia and was thus based upon criteria which we subject to the most rigid scrutiny. *Loving* v. *Virginia*, 388 U. S. 1, 11 (1967). *Schneider* involved an attempt to distinguish between native born and naturalized citizens solely for administrative convenience. By authorizing residence requirements Congress acted not to facilitate an administrative function but to further its conviction that an impediment to the commercial life of this Nation would be removed by a program of cooperative federalism combining federal contributions with enhanced state benefits. Congress, not the courts, is charged with determining the proper prescription for a national illness. I cannot say that Congress is powerless to decide that residence requirements would promote this permissible goal and therefore must conclude that such requirements cannot be termed arbitrary.

The Court, after interpreting the legislative history in such a manner that the constitutionality of § 402 (b) is not at issue, gratuitously adds that § 402 (b) is unconstitutional. This method of aproaching constitutional questions is sharply in contrast with the Court's approach in *Street* v. *New York*, *ante*, at ——. While in *Street* the Court strains to avoid the crucial constitutional question, here it summarily treats the constitutionality of a major provision of the Social Security Act when, given the Court's interpretation of the legislative materials, that provision is not at issue. Assuming that the constitutionality of § 402 (b) is properly treated by the Court, the cryptic footnote in *Katzenbach* v.

Morgan, 384 U. S. 641, 651–652, n. 10 (1966), does not support its conclusion. Footnote 10 indicates that Congress is without power to undercut the equal-protection guaranty of racial equaity in the guise of implementing the Fourteenth Amendment. I do not mean to suggest otherwise. However, I do not understand this footnote to operate as a limitation upon Congress' power to further the flow of interstate commerce by reasonable residence requirements. Although the Court dismisses § 402 (b) with the remark that Congress cannot authorize the States to violate equal protection, I believe that the dispositive issue is whether under its commerce power Congress can impose residence requirements.

Nor can I understand the Court's implication in footnote 21, *ante*, that other state residence requirements such as those employed in determining eligibility to vote do not present constitutional questions. Despite the fact that in *Drueding* v. *Devlin*, 380 U. S. 125 (1964), we affirmed an appeal from a three-judge District Court after the District Court had rejected a constitutional challenge to Maryland's one-year residence requirement for presidential elections, the rationale employed by the Court in these appeals would seem to require the opposite conclusion. If a State would violate equal protection by denying welfare benefits to those who have recently moved interstate, then it would appear to follow that equal protection would also be denied by depriving those who have recently moved interstate of the fundamental right to vote. There is nothing in the opinion of the Court to explain this dichotomy. In any event, since the constitutionality of a state residence requirement as applied to a presidential election is raised in a case now pending *Hall* v. *Beals*, No. 950, 1968 Term, I would await that case for a resolution of the validity of state voting residence requirements.

III.

The era is long past when this Court under the rubric of due process has reviewed the wisdom of a congressional decision that interstate commerce will be fostered by the enactment of certain regulations. Compare *Adkins* v. *Children's Hospital*, 261 U. S. 525 (1923), with *United States* v. *Darby*, 312 U. S. 100 (1941). Speaking for the Court in *Helvering* v. *Davis*, 301 U. S. 619, 644 (1937), Mr. Justice Cardozo said of another section of the Social Security Act:

> "Whether wisdom or unwisdom resides in the scheme of benefits set forth . . . is not for us to say. The answer to such inquiries must come from Congress, not the courts. Our concern here, as often, is with power, not with wisdom."

I am convinced that Congress does have power to enact residence requirements of reasonable duration or to authorize the States to do so and that it has exercised this power.

The Court's decision reveals only the top of the iceberg. Lurking beneath are the multitude of situations in which States have imposed residence requirements including eligibility to vote, to engage in certain professions or occupations or to attend a state-supported university. Although the Court takes pains to avoid acknowledging the ramifications of its decision, its implications cannot be ignored. I dissent.

SUPREME COURT OF THE UNITED STATES

Nos. 9, 33, and 34.—October Term, 1968.

Bernard Shapiro, Commissioner of Welfare of the State of Connecticut, Appellant, v. Vivian Thompson.	On Appeal From the United States District Court for the District of Connecticut.
Walter E. Washington et al., Appellants, v. Clay Mae Legrant et al.	On Appeal From the United States District Court for the District of Columbia.
Roger A. Reynolds et al., Appellants, v. Juanita Smith et al.	On Appeal From the United States District Court for the Eastern District of Pennsylvania.

[April 21, 1969.]

Mr. Justice Harlan, dissenting.

The Court today holds unconstitutional Connecticut, Pennsylvania, and District of Columbia statutes which restrict certain kinds of welfare benefits to persons who have lived within the jurisdiction for at least one year immediately preceding their applications. The Court has accomplished this result by an expansion of the comparatively new constitutional doctrine that some state statutes will be deemed to deny equal protection of the laws unless justified by a "compelling" governmental interest, and by holding that the Fifth Amendment's Due Process Clause imposes a similar limitation on federal enactments. Having decided that the "compelling interest" principle is applicable, the Court then finds that the governmental interests here asserted are either wholly impermissible or are not "compelling." For reasons which follow, I disagree both with the Court's result and with its reasoning.

I.

These three cases present two separate but related questions for decision. The first, arising from the District of Columbia appeal, is whether Congress may condition the right to receive aid for dependent children (AFDC) and aid to the permanently and totally disabled in the District of Columbia upon the recipient's having resided in the District for the preceding year.[1] The second, presented in the Pennsylvania and Connecticut appeals, is whether a State may, with the approval of Congress, impose the same conditions with respect to eligibility for AFDC assistance.[2] In each instance, the

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[1] Of the District of Columbia appellees, all sought AFDC assistance except appellee Barley, who asked for aid to the permanently and totally disabled. In 42 U. S. C. § 602 (b), Congress has authorized "States" (including the District of Columbia, see 42 U. S. C. § 1301 (a)(1)) to require up to one year's immediately prior residence as a condition of eligibility for AFDC assistance. See n. 15, *infra*. In 42 U. S. C. §§ 1352 (b)(1) and 1382 (b)(2), Congress has permitted "States" to condition disability payments upon the applicant's having resided in the State for up to five of the preceding nine years. However, D. C. Code § 3–203 prescribes a one-year residence requirement for both types of assistance, so the question of the constitutionality of a longer required residence period is not before us.

Appellee Barley also challenged in the District Court the constitutionality of a District of Columbia regulation which provided that time spent in a District of Columbia institution as a public charge did not count as residence for purposes of welfare eligibility. The District Court held that the regulation must fall for the same reasons as the residence statute itself. Since I believe that the District Court erred in striking down the statute, and since the issue of the regulation's constitutionality has been argued in this Court only in passing, I would remand appellee Barley's cause for further consideration of that question.

[2] I do not believe that the Pennsylvania appeal presents the additional question of the validity of a residence condition for a purely, state-financed and authorized public assistance program. The

welfare residence requirements are alleged to be unconstitutional on two grounds: *first*, because they impose an undue burden upon the constitutional right of welfare applicants to travel interstate; *second*, because they deny to persons who have recently moved interstate and would otherwise be eligible for welfare assistance the equal protection of the laws assured by the Fourteenth Amendment (in the state cases) or the analogous protection afforded by the Fifth Amendment (in the District of Columbia case). Since the Court basically relies upon the equal protection ground, I shall discuss it first.

Pennsylvania welfare eligibility provision, 62 Pa. Stat. Ann. § 432 (1967), states:

"Except as hereinafter otherwise provided . . . , needy persons of the classes defined in clauses (1) and (2) of this section shall be eligible for assistance:

"(1) Persons for whose assistance Federal financial participation is available to the Commonwealth as . . . aid to families with dependent children, . . . and which assistance is not precluded by other provisions of law.

"(2) Other persons who are citizens of the United States . . . .

. . . . . .

"(6) Assistance may be granted only to or in behalf of a person residing in Pennsylvania who (1) has resided therein for at least one year immediately preceding the date of application; . . . ."

As I understand it, this statute initially divides Pennsylvania welfare applicants into two classes: (1) persons for whom federal financial assistance is available and not precluded by other provisions of federal law (if state law, including the residence requirement, were intended, the "Except as hereinafter otherwise provided" proviso at the beginning of the entire section would be surplusage); (2) other persons who are citizens. The residence requirement applies to both classes. However, since all of the Pennsylvania appellees clearly fall into the first or federally-assisted class, there is no need to consider whether residence conditions may constitutionally be imposed with respect to the second or purely state-assisted class.

II.

In upholding the equal protection argument,[3] the Court has applied an equal protection doctrine of relatively recent vintage: the rule that statutory classifications which either are based upon certain "suspect" criteria or affect "fundamental rights" will be held to deny equal protection unless justified by a "compelling" governmental interest. See *ante*, at 7, 14, 18.

The "compelling interest" doctrine, which today is articulated more explicitly than ever before, constitutes an increasingly significant exception to the long-established rule that a statute does not deny equal protection if it is rationally related to a legitimate governmental objective.[4] The "compelling interest" doctrine has two branches. The branch which requires that classifications based upon "suspect" criteria be supported by a compelling interest apparently had its genesis in cases involving racial classifications, which have at least since *Korematsu* v. *United States*, 323 U. S. 214, 216 (1944), been regarded as inherently "suspect."[5] The criterion of "wealth" apparently was added to the list of "suspects" as an alternative justification for the rationale in *Harper*

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[3] In characterising this argument as one based on an alleged denial of equal protection of the laws, I do not mean to disregard the fact that this contention is applicable in the District of Columbia only through the terms of the Due Process Clause of the Fifth Amendment. Nor do I mean to suggest that these two constitutional phrases are "always interchangeable," see *Bolling* v. *Sharpe*, 347 U. S. 497, 499 (1954). In the circumstances of this case, I do not believe myself obliged to explore whether there may be any differences in the scope of the protection afforded by the two provisions.

[4] See, *e. g.*, *Rapid Transit Corp.* v. *City of New York*, 303 U. S. 573, 578 (1938). See also *infra*, at 8–9.

[5] See *Loving* v. *Virginia*, 388 U. S. 1, 11 (1967); cf. *Bolling* v. *Sharpe*, 347 U. S. 497, 499 (1954). See also *Hirabayashi* v. *United States*, 320 U. S. 83, 100 (1943); *Yick Wo* v. *Hopkins*, 118 U. S. U. S. 356 (1886).

v. *Virginia Bd. of Elections*, 383 U. S. 663, 668 (1966), in which Virginia's poll tax was struck down. The criterion of political allegiance may have been added in *Williams* v. *Rhodes*, 393 U. S. 23 (1968).[6] Today the list apparently has been further enlarged to include classifications based upon recent interstate movement, and perhaps those based upon the exercise of *any* constitutional right, for the Court states *ante*, at 14:

> "The waiting-period provision denies welfare benefits to otherwise eligible applicants solely because they have recently moved into the jurisdiction. But in moving . . . appellees were exercising a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional."[7]

I think that this branch of the "compelling interest" doctrine is sound when applied to racial classifications, for historically the Equal Protection Clause was largely a product of the desire to eradicate legal distinctions founded upon race. However, I believe that the more recent extensions have been unwise. For the reasons stated in my dissenting opinion in *Harper* v. *Virginia Bd. of Elections*, *supra*, at 680, 683–686, I do not consider wealth a "suspect" statutory criterion. And when, as in *Williams* v. *Rhodes*, *supra*, and the present case, a classification is based upon the exercise of rights guaranteed against state infringement by the federal Constitution, then there is no need for any resort to the Equal Protection Clause; in such instances, this Court may properly and straightforwardly invalidate any undue burden upon those rights under the Fourteenth Amendment's Due Process Clause. See, *e. g.*, my concurring opinion in *Williams* v. *Rhodes*, *supra*, at 41.

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[6] See n. 9, *infra*

[7] See n. 9, *infra*

The second branch of the "compelling interest" principle is even more troublesome. For it has been held that a statutory classification is subject to the "compeling interest" test if the result of the classification may be to affect a "fundamental right," regardless of the basis of the classification. This rule was foreshadowed in *Skinner* v. *Oklahoma*, 316 U. S. 535, 541 (1942), in which an Oklahoma statute providing for compulsory sterilization of "habitual criminals" was held subject to "strict scrutiny" mainly because it affected "one of the basic civil rights." After a long hiatus, the principle reemerged in *Reynolds* v. *Sims*, 377 U. S. 533, 561–562 (1964), in which state apportionment statutes were subjected to an unusually stringent test because "any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Id.*, at 562. The rule appeared again in *Carrington* v. *Rash*, 380 U. S. 89, 96 (1965), in which, as I now see that case,[8] the Court applied an abnormally severe equal protection standard to a Texas statute denying certain servicemen the right to vote, without indicating that the statutory distinction between servicemen and civilians was generally "suspect." This branch of the doctrine was also an alternate ground in *Harper* v. *Virginia Bd. of Elections*, *supra*, see 383 U. S., at 670, and apparently was a basis of the holding in *Williams* v. *Rhodes*, *supra*.[9] It

[8] I recognize that in my dissenting opinion in *Harper* v. *Virginia Bd. of Elections*, *supra*, at 683, I characterized the test applied in *Carrington* as "the traditional equal protection standard." I am now satisfied that this was too generous a reading of the Court's opinion.

[9] Analysis is complicated when the statutory classification is grounded upon the exercise of a "fundamental" right. For then the statute may come within the first branch of the "compelling interest" doctrine because exercise of the right is deemed a "suspect" criterion and also within the second because the statute is considered to affect the right by deterring its exercise. *Williams* v. *Rhodes*, *supra*, is such a case insofar as the statutes involved both inhibited exercise of the

has reappeared today in the Court's cryptic suggestion, *ante*, at 7, that the "compelling interest" test is applicable merely because the result of the classification may be to deny the appellees "food, shelter, and other necessities of life," as well as in the Court's statement, *ante*, at 18, that "[s]ince the classification here touches on the fundamental right of interstate movement, its constitutionality must be judged by the stricter standard of whether it promotes a *compelling* state interest." [10]

I think this branch of the "compelling interest" doctrine particularly unfortunate and unnecessary. It is unfortunate because it creates an exception which threatens to swallow the standard equal protection rule. Virtually every state statute affects important rights. This Court has repeatedly held, for example, that the traditional equal protection standard is applicable to statutory classifications affecting such fundamental matters as the right to pursue a particular occupation,[11] the right to receive greater or smaller wages [12] or to work more or less hours,[13] and the right to inherit property.[14] Rights such as these are in principle indistinguishable from those involved here, and to extend the "compelling interest" rule to all cases in which such rights are affected would go far toward making this Court a "super-legislature." This branch of the doctrine is also unnecessary. When the right affected is one assured by

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right of political association and drew distinctions based upon the way the right was exercised. The present case is another instance, insofar as welfare residence statutes both deter interstate movement and distinguish among welfare applicants on the basis of such movement. Consequently, I have not attempted to specify the branch of the doctrine upon which these decisions rest.

[10] See n. 9, *supra*.

[11] See, *e. g.*, *Williamson* v. *Lee Optical Co.*, 348 U. S. 483 (1955); *Kotch* v. *Board of River Pilot Comm'rs*, 330 U. S. 552 (1947).

[12] See, *e. g.*, *Bunting* v. *Oregon*, 243 U. S. 426 (1917).

[13] See, *e. g.*, *Miller* v. *Wilson*, 236 U. S. 373 (1915).

[14] See, *e. g.*, *Ferry* v. *Spokane, P. & S. R. Co.*, 258 U. S. 314 (1922).

the federal Constitution, any infringement can be dealt with under the Due Process Clause. But when a statute affects only matters not mentioned in the federal Constitution and is not arbitrary or irrational, I must reiterate that I know of nothing which entitles this Court to pick out particular human activities, characterize them as "fundamental," and give them added protection under an unusually stringent equal protection test.

I shall consider in the next section whether welfare residence requirements deny due process by unduly burdening the right of interstate travel. If the issue is regarded purely as one of equal protection, then for the reasons just set forth this nonracial classification should be judged by ordinary equal protection standards. The applicable criteria are familiar and well-established. A legislative measure will be found to deny equal protection only if "it is without any reasonable basis and therefore is purely arbitrary." *Lindsley* v. *Natural Carbolic Gas Co.*, 220 U. S. 61, 78 (1911). It is not enough that the measure results incidentally "in some inequality," or that it is not drawn "with mathematical nicety," *ibid.*; the statutory classification must instead cause "different treatments . . . so disparate, relative to the difference in classification, as to be wholly arbitrary." *Walters* v. *City of St. Louis*, 347 U. S. 231, 237 (1954). Similarly, this Court has stated that where, as here, the issue concerns the authority of Congress to withhold "a noncontractual benefit under a social welfare program . . ., the Due Process Clause [of the Fifth Amendment] can be thought to interpose a bar only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification." *Flemming* v. *Nestor*, 363 U. S. 603, 611 (1960).

For reasons hereafter set forth, see *infra*, at 18–23, a legislature might rationally find that the imposition of a welfare residence requirement would aid in the accomplishment of at least four valid governmental ob-

jectives. It might also find that residence requirements have advantages not shared by other methods of achieving the same goals. In light of this undeniable relation of residence requirements to valid legislative aims, it cannot be said that the requirements are "arbitrary" or "lacking in rational justification." Hence, I can find no objection to these residence requirements under the Equal Protection Clause of the Fourteenth Amendment or under the analogous standard embodied in the Due Process Clause of the Fifth Amendment.

III.

The next issue, which I think requires fuller analysis than that deemed necessary by the Court under its equal protection rationale, is whether a one-year welfare residence requirement amounts to an undue burden upon the right of interstate travel. Four considerations are relevant: *First*, what is the constitutional source and nature of the right to travel which is relied upon? *Second*, what is the extent of the interference with that right? *Third*, what governmental interests are served by welfare residence requirements? *Fourth*, how should the balance of the competing considerations be struck?

The initial problem is to identify the source of the right to travel asserted by the appellees. Congress enacted the welfare residence requirement in the District of Columbia, so the right to travel which is invoked in that case must be enforceable against *congressional* action. The residence requirements challenged in the Pennsylvania and Connecticut appeals were authorized by Congress in 42 U. S. C. § 602 (b), so the right to travel relied upon in those cases must be enforceable against the States even though they have acted with congressional approval.

In my view, it is playing ducks and drakes with the statute to argue, as the Court does, *ante*, at 18–21, that Congress did not mean to *approve* these state residence

requirements. In 42 U. S. C. § 602 (b), quoted more fully, *ante*, at 18–19, Congress directed that:

> "[t]he Secretary shall approve any [state assistance] plan which fulfills the conditions specified in subsection (a) of this section, except that he shall not approve any plan which imposes as a condition of eligibility for [AFDC aid] a residence requirement [equal to or greater than one year]."

I think that by any fair reading this section must be regarded as conferring congressional approval upon any plan containing a residence requirement of up to one year.

If any reinforcement is needed for taking this statutory language at face value, the overall scheme of the AFDC program and the context in which it was enacted suggest strong reasons why Congress would have wished to approve limited state residence requirements. Congress determined to enlist state assistance in financing the AFDC program, and to administer the program primarily through the States. A previous Congress had already enacted a one-year residence requirement with respect to aid for dependent children in the District of Columbia.[15] In these circumstances, I think it only sensible to conclude that in allowing the States to impose limited residence conditions despite their possible impact on persons who wished to move interstate,[16] Congress was motivated by a desire to encourage state participation in

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[15] See Home Care Act for Dependent Children § 1, 44 Stat. 758, 759 (1926).

[16] The arguments for and against welfare residence requirements, including their impact on indigent migrants, were fully aired in congressional committee hearings. See, *e. g.*, Hearings on H. R. 4120 before the House Committee on Ways and Means, 74th Cong., 1st Sess., 831–832, 861–871 (1935); Hearings on S. 1130 before the Senate Committee on Finance, 74th Cong., 1st Sess., 522–540, 643, 656 (1935).

the AFDC program,[17] as well as by a feeling that the States should at least be permitted to impose residence requirements as strict as that already authorized for the District of Columbia. Congress therefore had a genuine federal purpose in allowing the States to use residence tests. And I fully agree with THE CHIEF JUSTICE that this purpose would render § 602 (b) a permissible exercise of Congress' power under the Commerce Clause, unless Congress were prohibited from acting by another provision of the Constitution.

Nor do I find it credible that Congress intended to refrain from expressing approval of state residence requirements because of doubts about their constitutionality or their compatibility with the Act's beneficent purposes. With respect to constitutionality, a similar residence requirement was already in effect for the District of Columbia, and the burdens upon travel which might be caused by such requirements must even in 1935 have been regarded as within the competence of Congress under its commerce power. If Congress had thought residence requirements entirely incompatible with the aims of the Act, it could simply have provided that state assistance plans containing such requirements should not be approved at all, rather than limiting approval to plans containing residence requirements of less than one year. Moreover, when Congress in 1944 revised the AFDC program in the District of Columbia to conform with the standards of the Act, it chose to condition eligibility upon one year's residence,[18] thus strongly indicating that

[17] I am not at all persuaded by the Court's argument that Congress' sole purpose was to compel " '[l]iberality of residence requirements.' " See *ante*, at 20. If that was the only objective, it could have been more effectively accomplished by specifying that to qualify for approval under the Act a state assistance plan must contain *no* residence requirement.

[18] See Act to provide Aid to Dependent Children in the District of Columbia § 3, 58 Stat. 277 (1944). In 1962, this Act was repealed

it doubted neither the constitutionality of such a provision nor its consistency with the Act's purposes.[19]

Opinions of this Court and of individual Justices have suggested four provisions of the Constitution as possible sources of a right to travel enforceable against the federal or state governments: the Commerce Clause;[20] the Privileges and Immunities Clause of Art. IV, § 2;[21] the Privileges and Immunities Clause of the Fourteenth Amendment;[22] and the Due Process Clause of the Fifth Amendment.[23] The Commerce Clause can be of no assistance to these appellees, since that clause grants plenary power to Congress,[24] and Congress either enacted or approved all of the residence requirements here challenged. The Privileges and Immunities Clause of Art. IV, § 2,[25] is irrelevant, for it appears settled that this clause neither limits federal power nor prevents a State from distinguishing among its own citizens, but simply "prevents a State from discriminating against citizens of other States in favor of its own." *Hague* v. *CIO*, 307 U. S. 496, 511 (1939) (opinion of Roberts, J.); see *Slaughter-House Cases*, 16 Wall. 36, 77 (1873). Since Congress enacted the District of Columbia residence statute, and since the Pennsylvania and Connecticut appellees were residents

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and replaced by D. C. Code § 3–203, the provision now being challenged. See 76 Stat. 914 (1962).

[19] Compare *ante*, at 19–21 and nn. 24–25.

[20] See, *e. g.*, *Edwards* v. *California*, 314 U. S. 160 (1941); *The Passenger Cases*, 7 How. 282 (1849).

[21] See, *e. g.*, *Corfield* v. *Coryell*, 6 Fed. Cas. 546 (No. 3230) (1823) (Mr. Justice Washington).

[22] See, *e. g.*, *Edwards* v. *California*, 314 U. S. 160, 177, 181 (1941) (DOUGLAS and Jackson, JJ., concurring); *Twining* v. *New Jersey*, 211 U. S. 78, 97 (1908) (dictum).

[23] See, *e. g.*, *Kent* v. *Dulles*, 357 U. S. 116, 125–217 (1958); *Aptheker* v. *Secretary of State*, 378 U. S. 500, 505–506 (1964).

[24] See, *e. g.*, *Prudential Ins. Co.* v. *Benjamin*, 328 U. S. 408, 423 (1946). See also *Maryland* v. *Wirtz*, 392 U. S. 183, 193–199 (1968).

[25] "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

and therefore citizens of those States when they sought welfare, the clause can have no application in any of these cases.

The Privileges and Immunities Clause of the Fourteenth Amendment provides that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." It is evident that this clause cannot be applicable in the District of Columbia appeal, since it is limited in terms to instances of state action. In the Pennsylvania and Connecticut cases, the respective States did impose and enforce the residence requirements. However, Congress approved these requirements in 42 U. S. C. § 602 (b). The fact of congressional approval, together with this Court's past statements about the nature of the Fourteenth Amendment Privileges and Immunities Clause, leads me to believe that the clause affords no additional help to these appellees, and that the decisive issue is whether Congress itself may impose such requirements. The view of the Privileges and Immunities Clause which has most often been adopted by the Court and by individual Justices is that it extends only to those "privileges and immunities" which "arise or grow out of the relationship of United States citizens to the national government." *Hague* v. *CIO*, 307 U. S. 496, 518, 520 (1939) (opinion of Stone, J.).[26] On the authority of *Crandall* v. *Nevada*, 6 Wall. 35 (1868), those privileges and immunities have repeatedly been said to include the right to travel from State to State,[27] presumably for the reason assigned in *Crandall:* that state restrictions on travel

[26] See *Slaughter-House Cases*, 16 Wall. 36, 79 (1873); *In re Kemmler*, 136 U. S. 436, 448 (1890); *McPherson* v. *Blacker*, 146 U. S. 1, 38 (1892); *Giozza* v. *Tiernan*, 148 U. S. 657, 661 (1893); *Duncan* v. *Missouri*, 152 U. S. 377, 382 (1894); *Twining* v. *New Jersey*, 211 U. S. 78, 97–98 (1908).

[27] See, *e. g.*, *Slaughter-House Cases*, *supra*, at 79; *Twining* v. *New Jersey*, *supra*, at 97.

might interfere with intercourse between the Federal Government and its citizens.[28] This kind of objection to state welfare residence requirements would seem necessarily to vanish in the face of congressional authorization, for except in those instances when its authority is limited by a constitutional provision binding upon it (as the Fourteenth Amendment is not), Congress has full power to define the relationship between citizens and the Federal Government.

Some Justices, notably the dissenters in the *Slaughter-House Cases*, 16 Wall. 36, 83, 111, 124 (1873) (Field, Bradley, and Swayne, JJ., dissenting), and the concurring Justices in *Edwards* v. *California*, 314 U. S. 160, 177, 181 (1941) (DOUGLAS and Jackson, JJ., concurring), have gone further and intimated that the Fourteenth Amendment right to travel interstate is a concomitant of federal citizenship which stems from sources even more basic than the need to protect citizens in their relations with the Federal Government. The *Slaughter-House* dissenters suggested that the privileges and immunities of national citizenship, including freedom to travel, were those natural rights "which of right belong to the citizens of all free governments," 16 Wall., at 98 (Field, J.). However, since such rights are "the rights of citizens of any free government," *id.*, at 114 (Bradley, J.), it would appear that they must be immune from national as well as state abridgment. To the extent that they may be validly limited by Congress, there would seem to be no reason why they may not be similarly abridged by States acting with congressional approval.

The concurring Justices in *Edwards* laid emphasis not upon natural rights but upon a generalized concern for

[28] The *Crandall* Court stressed the "right" of a citizen to come to the national capital, to have access to federal office officials, and to travel to seaports. See 6 Wall., at 44. Of course, *Crandall* was decided before the enactment of the Fourteenth Amendment.

the functioning of the federal system, stressing that to allow a State to curtail "the rights of national citizenship would be to contravene every conception of national unity," 314 U. S., at 181 (DOUGLAS, J.), and that "if national citizenship means less than [the right to move interstate] it means nothing." *Id.*, at 183 (Jackson, J.). However, even under this rationale the clause would appear to oppose no obstacle to congressional delineation of the rights of national citizenship, insofar as Congress may do so without infringing other provisions of the Constitution. Mr. Justice Jackson explicitly recognized in *Edwards* that "The right of citizens to migrate from state to state [is] subject to all constitutional limitations imposed by the federal government," *id.*, at 184. And nothing in the nature of federalism would seem to prevent Congress from authorizing the States to do what Congress might validly do itself. Indeed, this Court has held, for example, that Congress may empower the States to undertake regulations of commerce which would otherwise be prohibited by the negative implications of the Commerce Clause. See *Prudential Ins. Co.* v. *Benjamin*, 328 U. S. 408 (1946). Hence, as has already been suggested, the decisive question is whether Congress may legitimately enact welfare residence requirements, and the Fourteenth Amendment Privileges and Immunities Clause adds no extra force to the appellees' attack on the requirements.

The last possible source of a right to travel is one which does operate against the Federal Government: the Due Process Clause of the Fifth Amendment.[22] It is now set-

[22] Professor Chafee has suggested that the Due Process Clause of the Fourteenth Amendment may similarly protect the right to travel against state interference. See Z. Chafee, Three Human Rights in the Constitution of 1787, p. 192 (1956). However, that clause surely provides no greater protection against the States than does the Fifth Amendment clause against the Federal Government,

tled that freedom to travel is an element of the "liberty" secured by that clause. In *Kent* v. *Dulles*, 357 U. S. 116, 125 (1958), the Court said:

> "The right to travel is a part of the 'liberty' of which the citizen cannot be deprived without due process of law under the Fifth Amendment. . . . Freedom of movement across frontiers . . . , and inside frontiers as well, was a part of our heritage . . . ."

The Court echoed these remarks in *Aptheker* v. *Secretary of State*, 378 U. S. 500, 505–506 (1964), and added:

> "[S]ince this case involves a personal liberty protected by the Bill of Rights, we believe that the proper approach to legislation curtailing that liberty must be that adopted by this Court in *NAACP* v. *Button*, 371 U. S. 415, and *Thornhill* v. *Alabama*, 310 U. S. 88 . . . .
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> "[S]ince freedom of travel is a constitutional liberty closely related to rights of free speech and association, we believe that appellants . . . should not be required to assume the burden of demonstrating that Congress could not have written a statute constitutionally prohibiting this travel." *Id.*, at 516–517.

However, in *Zemel* v. *Rusk*, 381 U. S. 1 (1965), the First Amendment cast of the *Aptheker* opinion was explained as having stemmed from the fact that *Aptheker* was forbidden to travel because of "expression or association on his part," *id.*, at 16. The Court noted that Zemel was "not being forced to choose between membership in an organization and freedom to travel," *ibid.*, and held that the mere circumstance that Zemel's proposed journey to Cuba might be used to collect information of political and social significance was not enough to bring the case within the First Amendment category.

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so the decisive question still is whether Congress may enact a residence requirement.

Finally, in *United States* v. *Guest*, 383 U. S. 745 (1966), the Court again had occasion to consider the right of interstate travel. Without specifying the source of that right, the Court said:

> "The constitutional right to travel from one State to another . . . occupies a position fundamental to the concept of our federal Union. It is a right that has been firmly established and repeatedly recognized. . . . [T]he right finds no explicit mention in the Constitution. The reason, it has been suggested, is that a right so elementary was conceived to be a necessary concomitant of the stronger Union the Constitution created. In any event, freedom to travel throughout the United States has long been recognized as a basic right under our Constitution." *Id.*, at 757. (Footnotes omitted.)

I therefore conclude that the right to travel interstate is a "fundamental" right which, for present purposes, should be regarded as having its source in the Due Process Clause of the Fifth Amendment.

The next questions are: (1) To what extent does a one-year residence condition upon welfare eligibility interfere with this right to travel?; and (2) What are the governmental interests supporting such a condition? The consequence of the residence requirements is that persons who contemplate interstate changes of residence, and who believe that they otherwise would qualify for welfare payments, must take into account the fact that such assistance will not be available for a year after arrival. The number or proportion of persons who are actually deterred from changing residence by the existence of these provisions is unknown. If one accepts evidence put forward by the appellees,[20] to the effect

[20] See Brief for Appellees in No. 33, at 49–51 and n. 70; Brief for Appellees in No. 34, at 24 n. 11; Supplemental Brief for Appellees on Reargument 27–30.

that there would be only a miniscule increase in the number of welfare applicants were existing residence requirements to be done away with, it follows that the requirements do not deter an appreciable number of persons from moving interstate.

Against this indirect impact on the right to travel must be set the interests of the States, and of Congress with respect to the District of Columbia, in imposing residence conditions. There appear to be four such interests. First, it is evident that a primary concern of Congress and the Pennsylvania and Connecticut Legislatures was to deny welfare benefits to persons who moved into the jurisdiction primarily in order to collect those benefits.[31] This seems to me an entirely legitimate objective. A legislature is certainly not obliged to furnish welfare assistance to every inhabitant of the jurisdiction, and it is entirely rational to deny benefits to those who enter primarily in order to receive them, since this will make more funds available for those whom the legislature deems more worthy of subsidy.[32]

[31] For Congress, see, *e. g.*, Problems of Hungry Children in the District of Columbia, Hearings before the Subcominittee on Public Health, Education, Welfare, and Safety of the Senate Committee on the District of Columbia, 85th Cong., 1st Sess. For Connecticut, see Connecticut General Assembly, 1965 Feb. Spec. Sess., 2 House of Representatives Proceedings 3505. For Pennsylvania, see Appendix in No. 34, at 96a–98a.

[32] There is support for the view that enforcement of residence requirements can significantly reduce welfare costs by denying benefits to those who come solely to collect them. For example, in the course of a long article generally critical of residence requirements, and after a detailed discussion of the available information, Professor Harvith has stated:

"A fair conclusion seems to be that, in at least some states, it is not unreasonable for the legislature to conclude that a useful saving in welfare costs may be obtained by residence tests discouraging those who would enter the state solely because of its welfare programs. In New York, for example, a one per cent saving in

A second possible purpose of residence requirements is the prevention of fraud. A residence requirement provides an objective and workable means of determining that an applicant intends to remain indefinitely within the jurisdiction. It therefore may aid in eliminating fraudulent collection of benefits by nonresidents and persons already receiving assistance in other States. There can be no doubt that prevention of fraud is a valid legislative goal. Third, the requirement of a fixed period of residence may help in predicting the budgetary amount which will be needed for public assistance in the future. While none of the appellant jurisdictions appears to keep data sufficient to permit the making of detailed budgetary predictions in consequence of the requirement,[23] it is probable that in the event of a very large increase or decrease in the number of indigent newcomers the waiting period would give the legislature time to make needed adjustments in the welfare laws. Obviously, this is a proper objective. Fourth, the residence requirements conceivably may have been predicated upon a legislative desire to restrict welfare payments financed in part by state tax funds to persons who have

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welfare costs would amount to several million dollars." Harvith, The Constitutionality of Residence Tests for General and Categorical Assistance Programs, 54 Calif. L. Rev. 567, 618 (1966). (Footnotes omitted.) See also *Helvering* v. *Davis*, 301 U. S. 619, 644 (1937).

For essentially the same reasons, I would uphold the Connecticut welfare regulations which except from the residence requirement persons who come to Connecticut with a bona fide job offer or with resources sufficient to support them for three months. See Conn. Welfare Manual, Vol. 1, c. II, §§ 219.1–219.2 (1966). Such persons are very unlikely to have entered the State primarily in order to receive welfare benefits.

[23] For precise prediction to be possible, it would appear that a residence requirement must be combined with a procedure for ascertaining the number of indigent persons who enter the jurisdiction and the proportion of those persons who will remain indigent during the residence period.

recently made some contribution to the State's economy, through having been employed, having paid taxes, or having spent money in the State. This too would appear to be a legitimate purpose.[24]

The next question is the decisive one: whether the governmental interests served by residence requirements outweigh the burden imposed upon the right to travel. In my view, a number of considerations militate in favor of constitutionality. First, as just shown, four separate, legitimate governmental interests are furthered by residence requirements. Second, the impact of the requirements upon the freedom of individuals to travel interstate is indirect and, according to evidence put forward by the appellees themselves, insubstantial. Third, these are not cases in which a State or States, acting alone, have attempted to interfere with the right of citizens to travel, but one in which the States have acted within the terms of a limited authorization by the national government, and in which Congress itself has laid down a like rule for the District of Columbia. Fourth, the legislatures which enacted these statutes have been fully exposed to the arguments of the appellees as to why these residence requirements are unwise, and have rejected them. This is not, therefore, an instance in which legislatures have acted without mature deliberation.

Fifth, and of longer-range importance, the field of welfare assistance is one in which there is a widely recognized need for fresh solutions and consequently for experimentation. Invalidation of welfare residence

[24] I do not mean to imply that each of the above purposes necessarily was sought by each of the legislatures that adopted durational residence requirements. In Connecticut, for example, the welfare budget is apparently open-ended, suggesting that this State is not seriously concerned with the need for more accurate budgetary estimates.

requirements might have the unfortunate consequence of discouraging the Federal and State Governments from establishing unusually generous welfare programs in particular areas on an experimental basis, because of fears that the program would cause an influx of persons seeking higher welfare payments. Sixth and finally, a strong presumption of constitutionality attaches to statutes of the types now before us. Congressional enactments come to this Court with an extremely heavy presumption of validity. See, *e. g.*, *Brown* v. *Maryland*, 12 Wheat. 419, 436 (1827); *Insurance Co.* v. *Glidden Co.*, 284 U. S. 151, 158 (1931); *United States* v. *Butler*, 297 U. S. 1, 67 (1936); *United States* v. *National Dairy Corp.*, 372 U. S. 29, 32 (1963). A similar presumption of constitutionality attaches to state statutes, particularly when, as here, a State has acted upon a specific authorization from Congress. See, *e. g.*, *Powell* v. *Pennsylvania*, 127 U. S. 678, 684–685 (1888); *United States* v. *Des Moines & Co.*, 142 U. S. 510, 544–545 (1892).

I do not consider that the factors which have been urged to outweigh these considerations are sufficient to render unconstitutional these state and federal enactments. It is said, first, that this Court, in the opinions discussed, *supra*, at 15–17, has acknowledged that the right to travel interstate is a "fundamental" freedom. Second, it is contended that the governmental objectives mentioned above either are ephemeral or could be accomplished by means which do not impinge as heavily on the right to travel, and hence that the requirements are unconstitutional because they "sweep unnecessarily broadly and thereby invade the area of protected freedoms." *NAACP* v. *Alabama*, 377 U. S. 288, 307 (1964). The appellees claim that welfare payments could be denied those who come primarily to collect welfare by means of less restrictive provisions, such as New York's

Welfare Abuses Law;" that fraud could be prevented by investigation of individual applicants or by a much shorter residence period; that budgetary predictability is a remote and speculative goal; and that assurance of investment in the community could be obtained by a shorter residence period or by taking into account prior intervals of residence in the jurisdiction.

Taking all of these competing considerations into account, I believe that the balance definitely favors constitutionality. In reaching that conclusion, I do not minimize the importance of the right to travel interstate. However, the impact of residence conditions upon that right is indirect and apparently quite insubstantial. On the other hand, the governmental purposes served by the requirements are legitimate and real, and the residence requirements are clearly suited to their accomplishment. To abolish residence requirements might well discourage highly worthwhile experimentation in the welfare field. The statutes come to us clothed with the authority of Congress and attended by a correspondingly heavy presumption of constitutionality. Moreover, although the appellees assert that the same objectives could have been achieved by less restrictive means, this is an area in which the judiciary should be especially slow to fetter the judgment of Congress and of some 46 states legislatures[36] in the choice of methods. Residence requirements have

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[35] That law, N. Y. Soc. Welfare Law § 139–a, requires public welfare officials to conduct a detailed investigation in order to ascertain whether a welfare "applicant came into the state for the purpose of receiving public assistance or care and accordingly is undeserving of and ineligible for assistance . . ."

[36] The figure may be variously calculated. There was testimony before the District Court in the Pennsylvania case that 46 States had some form of residence requirement for welfare assistance. Appendix in No. 34, at 32a–33a. It was stipulated in the Connecticut case that in 1965 40 States had residence requirements for aid to dependent children. Appendix to Appellant's Brief in No. 813, at 45a. See also *ante*, at 19–20 and n. 22.

advantages, such as administrative simplicity and relative certainty, which are not shared by the alternative solutions proposed by the appellees. In these circumstances, I cannot find that the burden imposed by residence requirements upon ability to travel outweighs the governmental interests in their continued employment. Nor do I believe that the period of residence required in these cases—one year—is so excessively long as to justify a finding of unconstitutionality on that score.

I conclude with the following observations. Today's decision, it seems to me, reflects to an unusual degree the current notion that this Court possesses a peculiar wisdom all its own whose capacity to lead this Nation out of its present troubles is contained only by the limits of judicial ingenuity in contriving new constitutional principles to meet each problem as it arises. For anyone who, like myself, believes that it is an essential function of this Court to maintain the constitutional divisions between state and federal authority and among the three branches of the Federal Government, today's decision is a step in the wrong direction. This resurgence of the expansive view of "equal protection" carries the seeds of more judicial interference with the state and federal legislative process, much more indeed than does the judicial application of "due process" according to traditional concepts, see my dissenting opinion in *Duncan* v. *Louisiana*, 391 U. S. 145, 171 (1968), about which some members of this Court have expressed fears as to its potentialities for setting us judges "at large." [37] I consider it particularly unfortunate that this judicial roadblock to the powers of Congress in this field should occur at the very threshold of the current discussions regarding the "federalizing" of these aspects of welfare relief.

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[37] Cf. *Harper* v. *Virginia Bd. of Elections*, 383 U. S. 663, 670, 675–680 (BLACK, J., dissenting).